IN THE COURT OF
APPEAL AT KISUMU
(CORAM: NYAMWEYA, ACHODE & MATIVO, JJ.A)

CRIMINAL APPEAL NO. E019 OF 2020

BETWEEN

JARED GISEMBA NYATUKA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nyamira (E.N Maina. J), dated 23rd January 2020
in
***HCCR Appeal No. 23 of 2019*)**
****

****** JUDGMENT OF THE COURT**

1. This appeal is the appellant's second attempt to dislodge a conviction on a charge of robbery with violence contrary to **Section 295,** as read with **Section 296 (2)** of the **Penal Code,** in the Chief Magistrate's Court at Nyamira on 13th June 2019 and the sentence of life imprisonment that ensued. His first appeal in the High Court of Kenya at Nyamira came to naught when, on 23rd January 2020, ***Maina J.***, upheld the conviction and affirmed the sentence.

2. The particulars of the offence were that on 26th May 2016 at Kebirigo town in Nyamira South Sub-county within

Nyamira

County, jointly with others not before court, armed with offensive weapons namely pangas, axes and clubs, they robbed Joel Atuti Ondicho of cash Kshs. 41,000/=, a Vitron television, LG DVD, 2 iron boxes, 2 pairs of Safari boots, 2 mobile phones make Itel and Nokia, all valued at Kshs. 59,000 and immediately before or after the time of such robbery, threatened to use actual violence to the said Joel Atuti Ondicho.

3. The prosecution's case as presented by seven witnesses was that Joel Atuti Ondicho, PW1 was asleep in his house at Kebirigo town together with his wife on the night of 26th May 2016, when a group of people forcibly entered their bedroom. They had left the electric lights in the bedroom on and they remained on throughout the incident. The attackers were armed with machetes, axes, and clubs. They demanded money threatening to harm him.

4. PW1 stated that the intruders were not masked and two of them donned berets resembling those worn by police officers. He got out of bed and conversed with them as they demanded

for money. The intruders stole cash amounting to Kshs. 41,000, a Vitron television set, an LG DVD player, two iron boxes, two pairs of Safari boots, and two mobile phones, make Itel and Nokia.

5. Agnes Nyakerario Bundi PW2, the wife to PW1, confirmed that they had retired to bed with her husband on the material night, when the intruders struck. By the electric light in the bedroom which was on throughout the incident, she saw more than one intruder and they were armed. She did not see their faces clearly because she remained in bed throughout the ordeal. They stole various items from their house, including her mobile phone make Itel. The phone was later recovered by the police and she positively identified it as her property.

6. PC Robert Koech, PW3 the Investigating Officer, commenced investigations upon receiving the report of robbery. He was able to locate one of the stolen mobile phones, make Itel and tracked it through several hands. He eventually recovered it from Doris Kemunto, PW7 and arrested the suspects connected with its recovery. The phone was later identified

by

PW2 as her property. Subsequently, he arrested and charged the appellant.

7. Inspector Daniel Marucha PW4, the Identification Parade Officer, conducted the parade for the appellant. He stated that before the parade, he explained the procedure and the appellant's rights to him and ensured that the parade was properly constituted with members of similar appearance. That the PW1 informed him prior to the parade that one of the attackers had a scar below the left eye. During the parade, PW1 easily and without hesitation identified the appellant as one of the robbers and that the identification parade was conducted in accordance with the laid-down rules.

8. Alice Moraa Okerio PW5, a neighbour to PW1 corroborated his evidence that he was attacked on the material night.

9. Reuben Karanja Sese PW6, a village mate and acquaintance of the appellant stated that shortly after the robbery, the appellant sold him an Itel mobile phone which he gave to PW7. When the police subsequently arrested him in connection with the phone, he explained that he acquired it

from the appellant.

He maintained that the appellant sold the phone to him and that he had no reason to falsely implicate the appellant.

10. Doris Kemunto PW7, confirmed that PW6 bought and gifted her a mobile phone make Itel, which she later came to learn had been stolen during a robbery. The police recovered the phone in her possession and it was she who explained to them that she had acquired it from PW6.

11. At the close of the prosecution case the appellant was put on his defence. He gave sworn testimony and called no witnesses. He denied being among the persons who robbed PW1 on the night of 26th May 2016 and maintained that the charge against him was false. He alleged that he was framed due to a longstanding land dispute involving his uncle, one Thomas Gisemba, and that his arrest had no connection with the alleged robbery. That at the time of his arrest he was intoxicated. He denied selling any stolen mobile phone to PW6 and disowned the evidence connecting him to the recovered Itel phone.

12. Upon conclusion of the case, Hon. M.O Wambani, learned Chief Magistrate, found the appellant guilty as charged and convicted him in a judgment dated 13th June 2019. She sentenced him to life imprisonment in accordance with the law.

13. Aggrieved by the judgement the appellant filed an appeal in the High Court at Nyamira contesting both conviction and sentence. Upon considering the appeal, ***Maina J***. found no merit in the appeal and upheld the conviction and sentence in a judgment delivered on 23rd January 2020.

14. Undeterred, the appellant filed the present appeal. He filed an undated memorandum of appeal and advanced grounds that: the conviction and sentence were illegal, having been founded on an offence not disclosed by the charge sheet or the evidence; the identification was unreliable; the prosecution evidence was contradictory; essential prosecution witnesses were not called; the trial court shifted the burden of proof to the appellant; and, the trial court failed to properly consider the defence as required by law.

15. M/s O.J. Okoth & Company Advocates came on record for the appellant and filed a supplementary memorandum of appeal dated 26th August 2025. Counsel raised two grounds of appeal alleging that the learned Judge of the High Court erred in law in relying on the outcome of an Identification Parade that was conducted in an unscrupulous manner, and in relying on the testimony of PW6 in the absence of documentary evidence, independent witness, or exhibit directly connecting the appellant to the alleged sale of the phone.

16. The appellant filed submissions dated 11th February 2025 in person and urged that no medical evidence, or P3 form was produced to demonstrate that the complainants sustained injuries during the alleged robbery. Further, that the alleged weapons such as machetes, axes and clubs were not produced in evidence. Consequently, the essential ingredients of the offence were not established.

17. The appellant argued that the courts below erred in invoking the doctrine of recent possession, the prosecution having failed to prove ownership and recovery of the alleged stolen

mobile phone. That there were inconsistencies in the serial numbers appearing on the purchase receipt, witness statements and the phone allegedly recovered. That the absence of a proper inventory and the discrepancies in the serial numbers rendered the evidence unreliable and incapable of linking him to the offence. Further that the trial court improperly relied on the uncorroborated evidence of accomplices, particularly PW6 and PW7 who were arrested in connection with the offence and were therefore potentially motivated to shift blame. He maintained that there was no documentary or independent evidence to support the claim that PW6 purchased the phone from him.

18. The appellant additionally challenged the identification evidence, contending that the conviction was based on the flawed testimony of a single identifying witness under difficult circumstances. He contended that the identification parade was improperly conducted, as the witness had allegedly seen him prior to the parade and he was the only participant bearing a distinguishing scar. He argued that the witness did

not provide a prior description of the attacker before the parade, thereby rendering the identification unreliable.

19. The appellant also submitted that the courts erred in convicting him on what he described as a duplex charge sheet, and that the framing of the charge was defective.

20. Finally, the appellant urged that the sentence of life imprisonment imposed upon him was manifestly harsh and excessive. He contended that the indeterminate nature of the life sentence violates constitutional principles and that the circumstances of the case did not warrant such a severe penalty. In the alternative, he urged that should the conviction be upheld, the Court should substitute the life sentence with a lesser term, considering the period already served in custody.

21. The firm of M/s O.J. Okoth & Company Advocates filed supplementary submissions dated 26th August 2025, on behalf of the appellant and urged on two grounds. First, that the identification parade was conducted in violation of the Police Force Standing Orders made pursuant to the **National Police Service Act, 2011**, and was therefore unreliable

and of no

probative value, PW1 having said that he identified the appellant based on a scar below the left eye and his height.

22. Counsel urged that **Standing Order 6 (iv) (d)** requires that where a suspect has a disfigurement, steps must be taken to ensure that it is not especially apparent. That no such steps were taken in this case, rendering the parade suggestive and unfair. That **Standing Order 6 (iv) (n)** requires that identification parades be conducted with scrupulous fairness, failing which their evidential value is diminished or nullified. Counsel urged that the circumstances herein were akin to the case of **Calvins Peter Omondi Owayo v Republic [2010] eKLR**, where the Court rejected an identification parade for failure to comply with the Standing Orders, and concluded that the trial court erred in relying on a flawed identification parade to found a conviction.

23. Secondly, counsel argued that the court misdirected itself by relying on the uncorroborated testimony of PW6, to link the appellant to the allegedly stolen phone, there being no receipt, documentary evidence, independent witness, or

exhibit

directly connecting the appellant to the sale of the phone. That the conviction rested solely on the word of PW6.

24. Counsel urged that although **section 143** of the **Evidence Act** permits a conviction on the testimony of a single witness, such evidence must attain a high threshold of credibility and reliability. He posited that the court improperly shifted the burden of proof by stating that it saw no reason why PW6 would lie, thereby placing an obligation on the appellant to demonstrate motive to lie. That this was a misdirection, as the burden remained on the prosecution to prove the truthfulness of the testimony of PW6 beyond reasonable doubt.

25. Counsel contended that the cumulative effect of an irregular identification parade and the absence of credible, corroborative evidence linking the appellant to the stolen phone rendered the conviction unsafe. He argued that the prosecution had failed to establish beyond reasonable doubt, any nexus between the appellant and the robbery and urged the Court to find that the conviction was based on legally infirm identification evidence and speculation rather than

proof.

26. In rebuttal, Ms. Vane Mochama, learned Prosecution counsel, filed submissions dated 23rd May 2025 for the respondent stating that both conviction and sentence were lawful. That the evidence established that the appellant, jointly with others not before court entered PW's house at about 2.05 a.m. on the material night while armed with machetes and axes and threatened to use violence as they robbed him. That these facts, as testified to by PW1 and corroborated by PW2, satisfied the ingredients of robbery with violence under **section 296(2)** of the **Penal Code** and the offence was therefore, properly proved.

27. Counsel submitted that there was no material contradiction regarding the recovered phone as the evidence established a clear chain of possession. That is, that the appellant robbed PW1 of the phone, sold it to PW6, who later gave it to PW7, from whom it was recovered. Additionally, PW6 and PW7 testified consistently, and PW1 and PW2 positively identified the phone as one of the items stolen during the robbery. That

the fact that the phone was recovered from a person who was not charged did not exculpate the appellant.

28. Counsel asserted that the identification evidence was proper and reliable and the evidence of PW1 as the sole identifying witness was sufficient in the circumstances. That the robbery occurred in a well-lit room, and PW1 had ample opportunity to observe the appellant and note the distinctive scar below the left eye at the earliest opportunity. PW2 did not identify the appellant as she did not leave the bed during the incident. In his view the identification parade was properly conducted, and any minor irregularities were not fatal.

29. Counsel further argued that the prosecution called all essential witnesses and conducted proper investigations. That at no point was the burden of proof shifted to the appellant and the trial court duly considered and correctly rejected the appellant's defence as a mere denial, which was unsupported by the evidence.

30. The appeal came before this Court for plenary hearing via the virtual platform on 2nd September, 2025. The appellant joined

the Court through the virtual link from Kisumu Maximum Prison and ***Mr. Okoth,*** learned counsel, was also present to represent him. ***Mr. Mwangi***, learned Prosecution Counsel, held brief for ***Mr. Mochama,*** learned Prosecution Counsel for the respondent. They both relied on the filed submissions.

31. In his brief oral high light Mr. Okoth reiterated that the evidence of the identification parade and the recovery of the phone was unsafe. Further that there were no aggravating circumstances to warrant the enhanced sentence. Mr. Mwangi on his part added that PW1 described the appellant in advance, including his manner of dress and that they conversed during the robbery and the person found with the phone knew him. Counsel urged that the sentence is legal but if the Court is minded to interfere with it he proposed 30 years imprisonment.

32. This being the second appeal, our mandate is confined to consideration of question of law only, by the dictates of **section 361 (a)** of the **Criminal Procedure Code** and severity of sentence is a matter of fact and not law. This

mandate was

articulated by this Court in the case of **Samuel Warui Karimi vs Republic [2016] eKLR** as follows:

> ***"This is the second appeal and this Court has stated many times before, it will not normally interfere with the concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See Chemangong vs R, (1984) KLR 611."***

33. We have considered the record and grounds of appeal together with the rival submissions and discern that the issues that arise for determination are: whether the prosecution proved the elements of robbery with violence under **section 296 (2)** of the **Penal Code** beyond reasonable doubt; whether the identification evidence was reliable and legally admissible; and, whether the evidence relating to the recovered mobile phone sufficiently linked the appellant to the offence.

34. To understand the offence of robbery with violence we read the provisions stated under **sections 295** and **section 296(2)** of the **Penal Code** together. The two sections

provide as follows:

"295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

296 (2). If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

35. This Court explained this symbiosis in ***Johana Ndungu vs. Republic [1996] KECA 187 (KLR)*** as follows:

"In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with s.295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery is presupposed in the three sets of circumstances prescribed in s.296 (2) which

we

give below and any one of which if proved will constitute the offence under the sub-section:

1. ***If the offender is armed with any dangerous or offensive weapon or instrument, or***
2. ***If he is in company with one or more other person or persons, or***
3. ***If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.***

Analyzing the first set of circumstances the essential ingredient apart from the ingredients including the use or threat to use actual violence constituting the offence of robbery being armed with a dangerous or offensive weapon. No other fact needs to be proved. Thus, if the facts show that at the time of commission of the offence of robbery as defined in section 295 of the Penal Code, the offender was armed in the manner afore-described then he is guilty of the offence under sub-section (2) and it is mandatory for the Court to so Convict him.

In the same manner in the second set of circumstances if it is shown and accepted by the Court that at the time of robbery the offender is in company with one or more person or persons then the offence under sub-section (2) is proved and a conviction thereunder must follow. The Court is not required to look for the presence of either of the other two set of circumstances.

With regard to the third set of circumstances, there is no mention of the offender being armed or being in company with others. The Court is not required to look for the presence of either of these two ingredients. If the Court finds that or immediately before or immediately after the time of robbery the offender wounds, beats, strikes or uses any other violence to any person (maybe a watchman and not necessarily the complainant or victim of theft) then it must find the offence under sub-section (2) proved and convict accordingly."

36. From the foregoing it is clear that the offence of robbery with violence is committed when robbery is proved and any one of the following three ingredients are established: the offender is armed with any dangerous or offensive weapon or instrument, or the offender is in the company of one or more other person or persons, or the offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person.

37. Further, in **Dima Denge Dima & Others vs Republic - Criminal Appeal No 300 of 2007**, the Court stated 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."

38. In the present case, the evidence established that there were more than two perpetrators, they were armed with machetes and axes, and they threatened to use violence on the PW1. These facts were narrated by PW1 and corroborated by PW2. It is immaterial that there was no medical evidence that PW1 was injured. Therefore, we find that the courts below were correct in their finding that the offence under section **296(2)** of the **Penal Code** was proved.

39. The more vexing question is whether the appellant was one of the robbers who attacked PW1 on the night in question. The appellant challenged the identification evidence on the ground that he was identified by a single witness and that the identification parade was defective. While the respondent urged that the identification was proper and reliable. Considering the evidence of identification the superior court stated that:

"Apart from evidence of identification, the appellant was connected to the robbery by the testimony of

Reuben Karanja Sese (Pw6), who gave credible

evidence that the appellant was the one who sold to him an Itel phone which was stolen from the complainant's wife (Pw2) during the robbery and which was tracked to Doris Kemunto (Pw7) by PC Koech (Pw3). Reuben Karanja Sese (Pw6) and the appellant were village mates and were known to each other prior to the time the latter sold the phone to him. There was nothing in the evidence to demonstrate that Reuben Karanja Sese (Pw6) had any reason to lie against the appellant and I therefore believed him. Both Pw6 and Pw7 who were the other two people arrested in connection with the robbery were treated as witnesses and the appellant's submission that they should have been subjected to an identification parade has no basis. The phone recovered from Doris (Pw7) and which had been purchased for her by (Pw6) was positively identified by Pw2 as hers and also as being one of the items stolen during the robbery. This piece of evidence therefore corroborates Pw1's evidence that the appellant was one of the robbers and confirms that there was no possibility of a mistaken identity."

40. Courts have pronounced themselves on the enduring question regarding the identification of perpetrator(s) in criminal cases time without number. For example, in the often-cited case of **R vs Turnbull & Others [1973] 3 ALL ER 549**, the Court rendered itself thus:

> ***"…the Judge should direct the jury to examine closely the circumstances in which***

the identification by each witness came to be made.

How long did the witness have with the accused under observation? At what distance: In what light: Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?"

41. The evidence of PW1 was that the robbery occurred in a well- lit room, with electric lighting that remained on throughout the incident. The ordeal lasted for approximately thirty minutes, during which PW1 interacted with the attackers at close range. The attackers were not masked and PW1 was able to observe the appellant and note a distinctive scar below his left eye. This description was given at the earliest opportunity in his first report to the police. The evidence of PW2 corroborated the circumstances under which the robbery occurred, including the lighting and duration. Her failure to identify the appellant was adequately explained, as she remained in bed during the incident.

42. Regarding the identification parade this Court in **Douglas Kinyua Njeru v Republic [2015] KECA 939 (KLR)** was persuaded by its decision in **David Mwita Wanja & 2 others – vs- Republic- Criminal Appeal No. 117 of 2005** where it held that:

> ***"The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders. See R v Mwango s/o Manaa (1936) 3 EACA 29. There are a myriad other decisions on various aspects of identification parades since then and we need only cite for emphasis Njihia v Republic [1986] KLR 422 where the court stated at page 424: -***
>
> ***"It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted***

and the

complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime."

43. We observe that although the identification parade did not strictly comply with **Standing Order 6(iv)(d)**, because the parade officer did not source for men with scars beneath their left eye, (which would not have been an easy fit to accomplish , we might add), the evidence of the identification parade is fortified by the circumstances under which PW1 made the identification, to wit: the presence of light in the room during the robbery; the length of time they were exposed to him; the proximity between him and the appellant during the incident; conversing face to face without masks; and, that he was able to describe the

appellant to the police in his first report.

44. Besides the identification parade, the recovered phone linked the appellant to the crime. The appellant contended that the testimony of PW6 that the court relied on to link him to the stolen phone was uncorroborated while the respondent posited that a clear chain of possession was established.

45. The doctrine of recent possession entitles the court to draw an inference of guilt where the accused is found in possession of recently stolen property in unexplained circumstances. The Court of Appeal summarized the essential elements of the doctrine of recent possession in the case of **Eric Otieno Arum v Republic - KSM CA Criminal Appeal No. 85 of 2005 [2006] eKLR,** as follows:

> **"*In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect; secondly, that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; 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.*"**

46. Once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for the possession. This burden is evidential only and does not relieve the prosecution of the duty to prove their case to the required standard. That explanation need only be a plausible one. (See- **Malingi v Republic [1988] KLR 225**).

47. Once an accused person is found in possession of recently stolen property, facts of how he came into possession of the property are especially within his knowledge and pursuant to the provisions of **section 111** of the **Evidence Act**, he has to discharge that burden. (See- **Paul Mwita Robi v Republic KSM CA No. 200 of 2008**.

48. PW6 testified that the appellant sold a phone to him shortly after the robbery that turned out to have been stolen during the robbery. PW6 gave the phone to PW7, from whom the police recovered it. PW2 positively identified the recovered phone as her property that was stolen during the robbery. The mere fact that the person from whom the phone was

recovered

was not charged did not break the chain of evidence, or absolve the appellant, particularly where credible testimony explains how the phone came into PW7's possession.

49. Having anxiously considered the record of appeal, rival submissions, authorities relied on and the law, we find no basis to fault the findings of the trial court as affirmed by the superior court on first appeal. Accordingly, we find no merit in this appeal and dismiss it in its entirety.

Dated and delivered at Kisumu this 13th day of March, 2026.

P. NYAMWEYA

.....

... JUDGE OF APPEAL

L. ACHODE

.....

... JUDGE OF APPEAL

J. MATIVO

.....

... JUDGE OF APPEAL

I certify that this is a true copy of the

original

DEPUTY REGISTRAR

THE COURT OF APPEAL
JUDICIARY
REPUBLIC OF KENYA