

**THE COURT OF
APPEAL AT
KISUMU**

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

CRIMINAL APPEAL NO. 129 OF 2015

BETWEEN

CLIFFORD ODHIAMBO ODERO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Homa Bay (Majanja J. & Nagillah J.) dated 22nd May, 2015

in

HCCRA No. 120 of 2014)

JUDGMENT OF THE COURT

1. **Clifford Odhiambo Odero**, the appellant herein, was charged with the offence of **robbery with violence** contrary to **Section 296 (2)** of the **Penal Code**. The particulars of the offence were that on 16th December, 2011, at Rongo Township, Central Kamagambo Location, within Migori County, the appellant, jointly with others not before court, being armed with offensive weapon, robbed **Onyango Geb Frank Wilhelm** of one mobile phone make LG,

passport, wallet, two packets of cigarettes, and

cash Kshs.3,000/=, all valued at Kshs.7,500/=, and immediately before or immediately after the time of such robbery wounded the said **Onyango Geb Frank Wilhelm**.

2. In the alternative, the appellant was charged with **handling stolen goods** contrary to **Section 322 (1) & (2)** of the **Penal Code**. The particulars of the charge alleged that on 17th December, 2011, at Rongo Township, Central Kamagambo Location, within Migori County, the appellant, otherwise than in the course of stealing, dishonestly retained one mobile phone make LG, one passport, and a wallet, having reasons to believe them stolen or unlawfully obtained.
3. The appellant pleaded not guilty to both charges.
4. In the ensuing trial, PW1 **Frank Wilhelm**, told the court that on 17th December, 2011, at 11.30 p.m., he left Stage Park, and was on his way to see his girlfriend when three people who approached him from behind, attacked him. They pushed him down and assaulted him, injuring his head and face. They stole his wallet, shoes, mobile phone, passport, and cash Kshs.3,000/=. The assailants afterwards fled the scene. PW1 stated that he reported the incident to the

police. He testified

that his mobile phone, passport and wallet were recovered from the appellant when he was arrested that same night.

5. PW2, Police Constable **Daniel Choge**, stationed at Kamagambo Police Station, was the investigating officer. He testified that on 17th December, 2011, at 11.00 p.m., PW1 came to the station and reported that he had been robbed by three assailants of his mobile phone, passport, wallet and Kshs.3,000/= . PW2 stated that they went to patrol the area and came across the appellant, who was walking near the police station at about 11.30 p.m. Upon conducting a quick search, they recovered PW1's passport, wallet and mobile phone from the appellant. They interrogated the appellant who told them that he had collected the item by the road side. PW2 testified that PW1 sustained injuries during the ordeal. He was issued him with a P3 form which was later filled at the hospital. They also obtained the clothes PW1 wore on the material night. They were torn and soiled, a clear sign of a struggle. PW2 thereafter recommended that the appellant be charged with the stated offences.
6. PW3, **Douglas Ombati**, produced the complainant's P3 form, which was filled on 17th December, 2011 at Rongo

District

Hospital. PW3 testified that upon examination, PW1 was found to have a swelling which was tender below his left eye. He was missing teeth on his lower jaw. The degree of the injuries were assessed as harm.

7. The appellant was placed on his defence. He elected to give sworn evidence and did not call any witnesses. It was his testimony that on the material night of 16th December, 2011, he was at Rongo Township watching a football match which ended at 11.00 p.m. He boarded a motorcycle taxi from where he was watching the match and alighted at Impact Research. He decided to walk on foot for the rest of the journey home. When he got to Kanyawanga sign board, he was stopped by police officers who arrested him and took him to the police station. He was not informed of the reason for his arrest. He was later arraigned before the trial court on 19th December, 2011 and charged. The appellant denied robbing the complainant. He stated that no stolen items were recovered from him when he was arrested. It was his testimony that he saw the said exhibits in court for the first time when they were produced. He

contended that, other than the police, there is no other witness or evidence connecting him to the offence.

8. The trial magistrate's court (Nyakundi, PM), in a judgment delivered on 29th June, 2012, found the appellant guilty as charged in the main count. The trial court convicted the appellant on the application of the doctrine of recent possession, and held that the appellant was unable to explain how the items stolen from the complainant were found in his possession so soon after the robbery incident. Upon conviction, the appellant was sentenced to death.
9. Dissatisfied by this decision, the appellant lodged an appeal before the High Court of Kenya at Kisii. In summary, the appellant challenged his conviction and sentence by the trial court on grounds that: the trial court failed to take into account the fact that the complainant did not identify him; the exhibits were not found in his possession and that he was being framed; the OCS and **PC Wanje**, who were said to be present during the search, were not availed as witnesses by the prosecution; the evidence of his arrest was inconsistent; and, that the

investigating officer held a grudge against him since he had previously bonded him to keep peace for two years.

10. The appeal before the High Court was dismissed on both conviction and sentence, upon re-evaluation of the evidence on record by the said 1st appellate court.
11. The appellant is now before us on a second appeal. The thrust of the appellant's appeal to this Court is that the prosecution did not establish the charge against him to the required standard of proof and that the sentence imposed was harsh and excessive.
12. The appeal was canvassed through written submissions, duly filed by both parties. **Ms. Omondi**, learned counsel for the appellant, contended that the ingredients forming the offence of robbery with violence were not sufficiently established by the prosecution. It was her submission that from the evidence on record, the appellant was arrested alone, and that he was not arrested in possession of any dangerous weapon. She argued that the complainant did not testify as to whether any weapon was used during the commission of the offence. Counsel submitted that an identification parade ought to have been

conducted in order for the complainant to identify the appellant. She maintained that his identification of the appellant in court was worthless.

13. **Ms. Omondi** further submitted that the doctrine of recent possession was erroneously applied by the two courts below, for reasons that not all the stolen items were recovered from the appellant. Further, the recovered items were not proved to belong to the complainant. She reiterated that the complainant failed to present documentary evidence to establish ownership of the recovered items. On sentence, counsel submitted that the death sentence meted by the trial court on the appellant was harsh and excessive. Finally, that the appellant's mitigation was not considered.
14. In rebuttal, learned prosecution counsel, **Mr. Okango**, asserted that the appellant's conviction was based on the doctrine of recent possession, and not the evidence of identification. He argued that although the appellant was arrested alone, the evidence by PW1 was that he was attacked by three assailants. Counsel urged that the medical evidence on record showed that PW1 sustained injuries below his left eye, and that he was

missing his lower teeth, which injuries were caused by a blunt object.

15. It was **Mr. Okango's** further submission that the doctrine of recent possession was properly applied in this case. He explained that the appellant was found in possession of the items stolen from the complainant upon his arrest. He asserted that the passport recovered from the appellant was an identification document that belonged to PW1. There was no contestation that the items recovered belonged to PW1. He maintained that the appellant failed to explain how he came to be in possession of the stolen items. On sentence, **Mr. Okango** submitted that the death sentence meted upon the appellant was legal, noting that the decision of the Supreme Court in **Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR (Muruatetu 2)**. In the circumstances, he invited us to dismiss the appeal.

16. This is a second appeal. The mandate of this Court on a second 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.”

17. We have carefully considered the record and the rival submissions set out above, in light of this Court’s mandate aforesaid. The issues for determination is whether the prosecution proved the charge of robbery with violence against the appellant beyond reasonable doubt, and particularly whether the doctrine of recent possession was properly applied. Secondly, whether the sentence imposed was manifestly harsh and excessive.
18. From the evidence on record, PW1 testified that on the material night, at about 11.30 p.m., he was attacked from

behind by three persons who pushed him down, assaulted
him and robbed

him of his wallet, shoes, mobile phone, passport and Kshs. 3,000/=. He sustained injuries on his face, and some of his teeth were knocked out during the ordeal. We observe that PW1 did not testify that he was able to identify any of the assailants. The attack occurred from behind. There was no evidence to suggest that the complainant had opportunity to recognize or see and identify his attackers. Consequently, the conviction could not have been based on visual identification. In those circumstances, the argument by the appellant that an identification parade ought to have been conducted is misplaced, as the prosecution case did not rely on evidence of identification at all.

19. The appellant's conviction instead rested on the application of the doctrine of recent possession. Was this doctrine properly invoked? This Court in the case of **Shida Kenga Mitsanze v Republic [2016] KECA 548 (KLR)** observed as follows, on the application of this doctrine.

“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.

20. Applying the above principles to this case, PW1 gave direct evidence that he was robbed of his mobile phone, passport, wallet and cash by three assailants. In the course of the robbery, he was assaulted and injured. His testimony was corroborated by the medical evidence produced by PW3 through a P3 form, which confirmed that PW1 sustained injuries during the ordeal. He had a swelling below his left eye and had missing lower teeth. The degree of the injuries were assessed as harm. The torn and soiled clothes produced by the investigating officer, which the complainant

wore on the material night,

further supported the occurrence of a violent struggle during the robbery.

21. PW2 testified that shortly after the report was made, police officers proceeded on patrol in the area and encountered the appellant at about 11.30 p.m., a short distance from the police station. Upon conducting a search on him, they recovered PW1's passport, wallet and mobile phone. These items were identified by the complainant as the ones stolen from him during the robbery. In particular, the passport was an identification document bearing PW1's particulars, leaving little doubt as to ownership. The assertion by the appellant that ownership was not proved due to lack of documentary evidence is therefore without any foundation. We note that the robbery occurred at about 11.00 p.m., and the appellant was found in possession of the stolen items almost immediately thereafter during the same night. Given the nature of the items and the very short time lapse between the robbery and the said recovery, the possession was clearly recent.
22. Once the prosecution established these elements, the evidential burden shifted to the appellant to offer a

reasonable explanation

as to how he came into possession of the said stolen items. The explanation attributed to him by PW2 was that he had picked the items by the roadside. In his defence, the appellant denied that any of the stolen items were recovered from him. He alleged that he saw the exhibits for the first time in court. The two courts below considered these explanations and rejected them. We find no reason to fault that conclusion. The defence by the appellant constituted a mere denial. He failed to give a plausible explanation as to how he came to be in possession of the items stolen from the complainant so soon after the robbery.

23. The appellant further submitted that he had been framed by PW2 due to a prior grudge between them, PW2 having allegedly arrested him previously in another case. We find this assertion incredulous. The record shows that during cross-examination of PW2, the appellant did not put to the witness the allegation that he had fabricated the case against him due to any personal grudge. Raising the allegation for the first time in his defence therefore renders it an afterthought. It is our finding that there existed no evidential basis upon which this Court can conclude

that PW2 had any motive to falsely implicate the appellant. He was doing his job as expected of him in the circumstances.

24. The appellant's unexplained possession of the complainant's property so soon after the robbery irresistibly leads to the inference that he was one of the perpetrators of the offence. The fact that not all the stolen items were recovered from him did not negate the application of the doctrine of recent possession, provided that some of the stolen property was recovered from the appellant within a short period after the robbery.
25. For a conviction for robbery with violence under **Section 296(2)** of the **Penal Code** to be sustained, the prosecution was required to prove any one of the three ingredients set out in law: that the offender was armed with a dangerous or offensive weapon; or was in the company of one or more other persons; or that at, or immediately before, or immediately after the time of the robbery the offender used personal violence against victim. (*See the decision of this Court in **Johana Ndungu v Republic [1996] KECA 187 (KLR)***).

26. In the present case, the evidence on record demonstrates that at least two of these ingredients were established. PW1 testified

that he was attacked by three assailants, thereby satisfying the requirement that the offender was in the company of more than one person. Further, the complainant was pushed to the ground and assaulted, sustaining injuries below his left eye and lower jaw, a fact corroborated by the medical evidence in the P3 form. These facts clearly demonstrated that personal violence was used against the complainant during the robbery. Accordingly, the essential ingredients of the offence of robbery with violence were sufficiently proved.

27. We therefore agree with the first appellate court that the prosecution proved its case beyond reasonable doubt. Accordingly, we find no merit in the appellant's challenge to the conviction.
28. The appellant also challenged the sentence imposed by the trial court, and affirmed by the first appellate court, contending that the death sentence was harsh, and that the trial court failed to consider his mitigation. The appellant was convicted of the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**, which prescribes the death penalty as the

lawful sentence upon conviction. The trial court therefore acted within the law in imposing that sentence.

29. We find it useful to add that in **Francis Karioko Muruatetu & another v Republic [2017] eKLR**, the Supreme Court declared the mandatory nature of the death sentence for the offence of murder unconstitutional, on the basis that it deprived courts of discretion to consider mitigation and the circumstances of each case. Subsequently, in **Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others** (supra), the Supreme Court clarified the scope of its earlier decision. The Court expressly stated that the 2017 decision was confined only to the offence of **murder** under **section 204** of the **Penal Code**, and did not automatically apply to other capital offences such as **robbery with violence** under **section 296(2)** of the **Penal Code**. The Supreme Court further directed that unless and until similar constitutional challenges are brought and determined in respect of those offences, the sentences prescribed by law for such offences remain valid and enforceable.

30. In the circumstances, we find that the sentence imposed was

legal and proper, and the appellant's contention that it was

harsh is without merit. Accordingly, we decline to interfere with the sentence.

31. In the end we are satisfied that the appeal is devoid of any merit and is accordingly dismissed in its entirety.

Dated and delivered at Kisumu this 24th day of April,2026.

ASIKE-MAKHANDIA

.....
**.. JUDGE OF
APPEAL**

H.A. OMONDI

.....
**JUDGE OF
APPEAL**

L. KIMARU

.....
**.. JUDGE OF
APPEAL**

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

DEPUTY REGISTRAR.