



REPUBLIC OF KENYA



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**Opolot v Republic (Criminal Appeal 13 of 2020)  
[2025] KECA 218 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KECA 218 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 13 OF 2020  
HM OKWENGU, HA OMONDI & JM NGUGI, JJA  
FEBRUARY 7, 2025**

**BETWEEN**

**MUSA OPOLOT ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment of the High Court of Kenya at Busia  
(Onyancha & Muchemi, JJ.) dated 8th November, 2011 in HCCRA No. 38 of 2007)*

**JUDGMENT**

1. The appellant, Musa Opolot, jointly with another were the accused persons in the trial before the Senior Principal Magistrate's Court at Busia in Criminal Case No. 1792 of 2005. They were charged with the offence of robbery with violence contrary to section 295 as read with section 296(2) of the [Penal Code](#). The particulars of the offence were that on the 12<sup>th</sup> day of August, 2005, at Bondeni Estate, Busia Township in Busia District within Western Province, now Busia County, the appellant, jointly with others not before court while armed with dangerous weapons namely AK 47 rifles, robbed George Ouma of one TV make National, one video deck make Sony, one video deck make Panasonic - S/No. L6NA18268, one bicycle make Neelam, one box and one bag containing assorted clothes, and cash Kshs. 1000/=, all valued at Kshs. 38,000/= and at or immediately before or immediately after the time of such robbery killed Millicent Akinyi.
2. The appellant also faced an alternative charge of handling stolen goods contrary to section 322(2) of the [Penal Code](#). The particulars of the offence were that on the 13<sup>th</sup> day of August, 2005, at Mawero village along Buoro road, Busia District in Uganda, otherwise than in the course of stealing, the appellant retained one video deck make Panasonic - S/No. L6NA18268, knowing or having reasons to believe it to be stolen or unlawfully obtained.



3. The record shows that two accused persons were arrested and charged in this matter but the second accused person died in the course of trial and the proceedings against him abated.
4. The appellant pleaded not guilty and the case proceeded to full hearing. At the conclusion of the trial, the learned trial magistrate convicted the appellant and sentenced him to death as provided for by the law.
5. The appellant was aggrieved by the decision of the lower court and filed an appeal against the conviction and sentence before the High Court.
6. The High Court (D.A. Onyancha, J. and F.N. Muchemi, J.) dismissed the appeal and upheld the conviction and converted the death sentence to a life sentence in a judgment dated 8<sup>th</sup> November, 2011.
7. The appellant was again dissatisfied with the decision of the High Court and has lodged the present appeal. He has raised one ground of appeal which is that: the learned judge erred in law by failing to evaluate the evidence as a whole and observe that the same was contradictory and inconsistent to sustain the conviction on the preferred charges.
8. Consequently, he prayed for the appeal to be allowed, the conviction quashed, sentence be set aside and he be released from custody.
9. A summary of the evidence that emerged at the trial through five (5) prosecution witnesses, which was subjected to a fresh review and scrutiny by the High Court, is as follows.
10. George Ouma Oriko, a businessman, was attacked and robbed in his house. He testified as PW1 and stated that on 12<sup>th</sup> August, 2005, at 4.35 am while he was asleep in his house, he was awakened by a gunshot. His wife, Akinyi, was awake on a chair in the sitting room while their two children were asleep. The door was hit using a stone and when it did not open, a shot was fired and four robbers broke and entered the house. He screamed as the robbers struggled to open the door. There was a security light (fluorescent lamp) at the door which illuminated outside and PW1 saw about fifteen other people outside the door. He told the court that the four robbers who entered the house wore long coats and two of them had torches that produced a lot of light, which he used to see their faces.
11. The house was a single room and was divided by a curtain. One of the robbers stood next to the bed holding a panga and guarded them, while another had a metal instrument for breaking doors and prying open windows. The other two gathered and carried household goods, which included a National colour TV; a video deck; a Panasonic deck; a Neelam bicycle; a box full of clothes and some money. PW1 lay on his side whilst facing the door and saw the robber who fired the gunshot standing outside the house. The robbery took about thirty minutes and, thereafter, the robbers fled.
12. PW1 then followed them for a short distance but they fired the gun and he ran back to his house. Upon his return, he found his wife lying down and groaning as she had been injured by the gunshot. He took her to hospital but unfortunately, she was pronounced dead on arrival. He reported the incident to the police who visited the scene.
13. On 14<sup>th</sup> August, 2005, he was informed by the police that some of his household goods which included a Panasonic deck and a box with clothes, had been recovered in Uganda. His bicycle was also found abandoned near the Uganda border. PW1 was taken to Busia Uganda Police Station where he identified the items. Afterwards, the goods were transferred to Busia Police Station.
14. PW1 informed the court that prior to the robbery, he had never seen the appellant and neither did he see the appellant and his co-accused when they were arrested. He, however, said that he could identify



- the appellant as he was among the gang of robbers who entered his house and carried his household goods.
15. John Otieno Opanga, a neighbour to PW1, testified as PW2 and said that he witnessed PW1's wife postmortem which was conducted on 15<sup>th</sup> August, 2005. He added that the postmortem was also witnessed by some police officers. He testified that the deceased had a bullet wound which had an exit point and it was confirmed that she died of a gunshot injury.
  16. PW3 was Sergeant Joseph Muli. He testified that on 12<sup>th</sup> August, 2005, at about 4.30 am while he was on duty patrolling with his colleague, CPL Ojwang, he heard the sound of a gunshot at Ujamii area. There was an exchange of fire between the police and the robbers and when they arrived at the scene of crime, the robbers had already fled. PW1 informed them that the robbers had stolen his TV set, two video decks, a bicycle, clothing and kshs. 1000/=. Meanwhile, during the robbery, PW1's wife was shot and later died.
  17. PW3 informed the court that the appellant was arrested in Uganda by the Uganda police and stolen goods were recovered from his house; one of which PW1 identified as belonging to him. The item PW1 identified as his was a Panasonic video deck S/No. LGNA18268. He stated that the video deck was taken to the police station exhibit store. He also stated that he was not part of the police officers who witnessed the recovery of the stolen goods.
  18. PW4 was Sergeant Ondiek Bernard from Busia Police Station in Uganda. He testified that on 13<sup>th</sup> August, 2005, at around 8.00 am, he received a report from a complainant who hailed from Marero village in Uganda. He visited the scene with two other police officers and recovered two empty cartridges. The victim of the robbery said he identified the robber as Musa Opolot (the appellant). The appellant was known to PW4, and so he went to his house and arrested him, during which time assorted electronics were recovered. He however clarified during cross examination that he did not know the complainant in this case and that he arrested the appellant (who was known to him for six years) with respect to a case in Marero village in Uganda.
  19. PW5, an Inspector of Police in Busia Uganda Police Station, whose name was not captured in the trial court proceedings, was the last witness. He testified that on 13<sup>th</sup> August, 2005, he received a call from his boss about the appellant who was known to him and who at the time was in police custody. He was directed to go to the appellant's house and search for stolen property. He did as he was directed and went to the appellant's house in Marero village in the company of police officers from Kenya. During their search, they recovered many items; some of which were identified by the victims of robberies that had occurred. The items recovered included electronics, clothes and shop goods. He stated that with respect to the instant case, a TV and other items were identified.
  20. When he was placed on his defence, the appellant gave sworn testimony and called no witnesses. He denied the charges against him and testified that on 13<sup>th</sup> August, 2005, at 9.00 am while he was at his shop, two people showed up and told him that he was needed at the police station. One of them was PW4, who was known to him (appellant). He accompanied them to the police station where he was informed that he was a robbery suspect. Police officers then went to his house and conducted a search but did not recover any exhibit. Instead, they picked his radio speakers, weighing scale, children's bicycle, cassette and business documents and then charged him. He denied knowing his co-accused and said that the video deck was not recovered from his house. It was also his testimony that prior to the incident, he had disagreed with PW4 over a lady.



21. The appeal was argued by way of written submissions by both parties. During the virtual hearing, learned counsel, Ms. Anyango appeared for the appellant, whereas learned counsel, Ms. Mwaniki appeared for the respondent. Both parties relied on their submissions.
22. Counsel for the appellant submitted that the first appellate court held that the doctrine of recent possession had been correctly applied to secure the appellant's conviction. However, counsel argued that not all the elements of the doctrine were present to warrant its application in this case. Counsel cited *Eric Otieno Arum vs. Republic, Kisumu Criminal Appeal No. 85 of 2005 [2006] eKLR*, and contended that possession was not positively proved as the appellant vehemently denied that the Panasonic video deck was recovered from his house; and that the prosecution would have easily disapproved his testimony by producing an inventory of the recovered exhibits, or an OB entry of the recovered items. However, the same was never done. Counsel also contended that the Panasonic video deck was not positively identified as being PW1's property as he never produced any document before the trial court that showed ownership of the same; nor did he state any peculiar feature on the deck that enabled him to identify it with complete certainty that same belonged to him. According to counsel, failure to produce proof of ownership of the video deck meant that it was not certain that the video deck allegedly recovered from the appellant belonged to PW1.
23. Second, counsel argued that the video deck was never produced as an exhibit before the trial court and so it was unable to verify its existence. Counsel submitted that in its judgment, the trial court alluded to the fact that the video deck got burnt at the station. However, the record shows that none of the prosecution witnesses, especially PW3, PW4 and PW5, who were police officers, ever mentioned that the video deck got burnt while in storage and there was also no report presented before the trial court confirming the said fire. For this reason, she submitted that it is not known whether the video deck was ever recovered as claimed or if it ever got burnt while in storage. She opined that it was not enough for PW1 to merely state that he identified his video deck at the police station and for the trial court to merely note from the testimony of witnesses that exhibits were allegedly recovered from the appellant's house. Rather, the trial court needed to see the video deck, in the same manner it was able to see the postmortem report that was produced as PEXH-1. She insisted that it was essential for the video deck to be produced in order for the doctrine of recent possession to apply; and it was for this reason that at the first appellate court, the prosecution rightly conceded to the appeal and submitted that there was no evidence of recent possession and no identification of items recovered.
24. Third, counsel submitted that even though this Court in *Peter Kihia Mwaniki vs. Republic, (2010) eKLR*, held that failure to produce certain exhibits was not fatal to the prosecution case, the prosecution produced other exhibits found in the appellant's possession which proved his guilt. Therefore, in applying the same measure in the instant case and given that the video deck was the only item that attached the appellant to this case, failure to produce it left a lacuna and also cast doubt in the prosecution case. Counsel opined that without the evidence of the video deck, the guilt of the appellant could not be proved beyond reasonable doubt. She cited *John Wachira Mutheke vs. Republic, [2014] eKLR* for the proposition that whereas the failure to produce exhibits is not necessarily fatal to the prosecution case, each case depends on its own peculiar circumstances. She contended that the circumstances of the instant case required that the video deck alleged to have been recovered from the appellant be produced as an exhibit as it was the only item that tied him to the crime. She submitted that whereas the trial court alluded that PW3 testified that the recovered Panasonic video deck got burnt at storage, a careful look at the record shows that PW3 never testified to the said aspect of the video deck being burnt.
25. Counsel also contended that the appellant was alluded to the existence of bad blood between him and PW4 over a lady; whilst PW4 testified that the complainant told him he could identify the robber



as the appellant. Therefore, considering the history between the appellant and PW4, it was crucial for the prosecution to ensure that they had dotted their I's and crossed their T's; especially when the exhibits were allegedly recovered from the appellant's premises and noting that the appellant denied the recovery of the said exhibits from his shop.

26. To sum up her submissions, counsel argued that failure to produce the video deck as an exhibit or failure to give reasons why the video deck could not be produced, cannot be said to be a procedural misstep. Rather, it was a major and grave inconsistency and fatal to the prosecution case. Hence, the appellant is entitled to an acquittal, especially since the prosecution conceded to the appeal at the first appellate court and the said court agreed with the appellant on the issue of identification. And in addition, there was nothing before the court that proved recent possession.
27. The prosecution opposed the appeal, arguing that as a second appellate court, the role of this Court is limited to matters of law under section 361(1)(a) of the *Criminal Procedure Code*. Unless the lower courts considered irrelevant matters or failed to consider crucial facts, this Court should not interfere with their concurrent findings.
28. Counsel maintained that the appellant's conviction was based on credible prosecution witnesses, particularly PW1 and PW4, and that the lower courts found no issues with their testimony. She cited precedent to argue that factual findings, such as the identification of recovered goods, are not subject to review in a second appeal.
29. On the issue of possession, the prosecution argued that the doctrine of recent possession was properly applied. Despite the appellant's claim that the identification conditions were insufficient, the High Court upheld his conviction based on his possession of stolen goods. Case law supports the presumption that an individual found in possession of recently stolen items is either the thief or a guilty receiver unless a reasonable explanation is provided, which the appellant failed to do.
30. Finally, counsel emphasized that although the State initially conceded to the appeal in the High Court, that court independently evaluated the evidence and upheld the conviction based on the doctrine of recent possession. Therefore, the prosecution urged the Court to dismiss the appeal and affirm the conviction and sentence.
31. This is a second appeal. As already stated by the respondent, our jurisdiction is limited to a consideration of matters of law only by dint of section 361(1) of the *Criminal Procedure Code*. It is only on rare occasions that we interfere with concurrent findings of fact by the two courts below. In *Samuel Warui Karimi vs. Republic* [2016] eKLR, it was held as follows:

“This is a second appeal and this Court has stated many times before, it will not normally interfere with 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.”

32. We have carefully considered the appeal, the rival submissions of the parties and the authorities cited in support of the opposing positions. In our view, the singular issue for determination in this case is whether the doctrine of recent possession was properly applied to link the appellant to the robbery. We say so because we note that the High Court, upon review of the trial record, concluded that the identification evidence was insufficient in this case. The learned Judge observed that:

“On identification, there was no parade conducted at Busia-Kenya Police Station. PW4 said in his testimony that PW1 knew the appellant Musa Opolot and had said he was one of the men



who robbed him of his goods. PW1 said he was not shown the suspects on arrest. PW1 said that lights were on during the day and that he identified the appellant, but not his accomplice Mohamed Ali. The role played by the appellant during the incident was not explained. The magistrate relied on both identification and recent possession but did not address the issue of failure to hold an identification parade and failure by PW1 to explain the actual role of the appellant. The intensity of the light was not considered either. In the circumstances we find that identification was not positive and could not sustain a conviction.”

33. This left the doctrine of recent possession as the only one linking the appellant to the crime of robbery with violence. Under our law, the doctrine of recent possession is a principle of circumstantial evidence that states that if someone is found in possession of recently stolen property without a reasonable explanation, then a rebuttable presumption can be drawn that they stole the property or received it knowing it was stolen.
34. This Court restated the doctrine and the elements that must be proved before the doctrine can be applied in *Erick Otieno Arum v Republic* Criminal Appeal 85 Of 2005 [2006] eKLR where it held:

“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; that 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.”
35. The appellant attacks the application of the doctrine of recent possession on three fronts. First, he argues that the complainant did not positively identify the allegedly stolen goods – the Panasonic video deck – because he did not produce any receipts or documents to prove ownership. Second, the appellant argues that the item could not have been said to have been found on him since no inventory was produced by the arresting officer to confirm so. Third, the appellant argues that since the item was never produced in evidence, it cannot be the basis for the application of the doctrine of recent possession. The appellant strongly argues that it was an error, which the High Court should have reversed, for the learned magistrate to state in the judgment that the video deck had been burnt down at the police station while there was no testimony to that effect by the police officers. In other words, the appellant implies that the learned magistrate “made up” the theory that the item had been burnt down.
36. We will presently address each of these lines of attack. First, we must point out that there is no rigid rule of law that for the doctrine of recent possession to apply, the complainant must produce receipts or an ownership document to prove that the item recovered from the accused person was his. The production of receipts and ownership documents is certainly a definite way to establish ownership but ownership of an item later recovered from a suspect is a question of fact. Like all questions of fact in a trial, it is provable by any admissible evidence including oral testimony. In this case, the complainant gave forthright testimony about his ownership of the Panasonic video deck which was recovered in the appellant’s house. The appellant did not contest the ownership in his line of cross-examination. The trial court made a factual finding that the item was, in fact, owned by the complainant. So did the High Court on first appeal. We have no reason to depart from that concurrent finding of fact by the two courts below.
37. The analysis is the same for the lack of inventory. While it is a salutary rule for the police to keep and produce an inventory of items seized from an accused person, the technical failure to do so is not fatal



to the application of the doctrine of recent possession provided that the trial court believes, as a matter of fact, and based on the other available, admissible evidence, that the item was, in fact, seized from the accused person.

38. Finally, the appellant argues that the fact that the item was not produced in evidence; and that there was no testamentary explanation for its absence is fatal. This would be the case if that combination of circumstances were true. But that is not the case here. In his testimony, the appellant told the trial court that he was called to Busia police station where he identified the Panasonic video deck as his. On the other hand, the handwritten court proceedings show that PW3, Sgt Joseph Muli of Busia Police Station testified on 17/05/2007 in pertinent part as follows:

“The deceased’s husband mentioned that a TV set, 2 video decks, a bicycle, clothes and kshs. 1,000 had been stolen.

On 14/05/05, the accused was arrested in Uganda by the Ugandan Police. The goods were recovered from the accused in his home. The complainant identified one of the video decks S. No. LG NA 18268, Panasonic as his.

The accused was charged with the offences. He is in the dock. A second suspect died in custody.

The video deck was burnt at the Police Station depot on 19/08/05.” (underlining ours)

39. It is true that the typed proceedings do not contain the underlined portion of PW3’s testimony. There is no question, however, that is what transpired in court hence the accepted explanation by the learned magistrate in the judgment that the Panasonic video deck recovered from the appellant and identified by the appellant as his was in fact, burnt down at the police station. Hence contrary to the position taken by the appellant that there was no testamentary explanation of the missing recently stolen item recovered from him, PW3, in fact, offered a straightforward explanation. The record indicates that the appellant did not pursue this line of inquiry in his cross-examination which would indicate that he was satisfied with the response given. Suffice it to say that while we cannot hazard a guess why the underlined portion of PW3’s testimony did not make it to the typed proceedings, we are satisfied that PW3 did, in fact, offer an explanation as to the missing recently stolen item and that the trial court found the explanation satisfactory. Indeed, that explanation led both the trial court and the High Court to reach concurrent findings of fact that the Panasonic video deck owned by the complainant was found in the possession of the appellant shortly after the robbery that took place at the complainant’s residence on 12/08/2005.
40. We are, therefore, satisfied that the doctrine of recent possession was properly applied in this case and that the possession of the recently stolen video deck linked the appellant to the robbery that took place. Since the appellant had no explanation of how the video deck belonging to the complainant which had been stolen during the robbery came into his possession, a compelling inference was permitted that he was one of the assailants.
41. The analysis of the facts of the case done by the two courts below, which we have no reason to depart from, also shows that all the other ingredients of the offence of robbery with violence were present. In particular, the evidence on record, as analyzed above, shows that there was more than one assailant; they were armed with at least one gun; at least one panga; and at least one iron rod; and, finally, at least one of them used force (they shot and killed the complainant’s wife). A combination of any of these two facts coupled with the fact that they also robbed the victim of the video deck and other items was sufficient to establish the offence of robbery with violence under section 296(2) of the *Penal Code*. See *Oluoch v Republic* (1985) KLR and *Joseph Njuguna Mwaura & 2 others vs. Republic* [2013] eKLR.



42. Consequently, we find the conviction, based on the doctrine of recent possession, safe and we hereby affirm it.
43. We will now briefly turn to the sentence. At the trial court, the appellant was sentenced to death as stipulated in section 296(2) of the Penal Code. At the High Court, the learned judges commuted the death sentence and, instead, imposed a sentence of life imprisonment.
44. In Francis Karioko Muruatetu & Another vs. Republic; Katiba Institute & 5 others (Amicus Curiae) (2021) eKLR (Muruatetu 2), the Supreme Court clarified that its earlier decision in Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR (Muruatetu 1) which declared unconstitutional the mandatory nature of the death sentence provided under section 204 of the Penal Code for the offence of murder, was not applicable to the offence of robbery with violence, and that the sentence of death provided under section 296(2) of the Penal Code remains the only lawful sentence for persons charged under that section. This means that the High Court judges were in error for setting aside the death sentence imposed on the appellant by the trial court and, instead, substituting it with a sentence of life imprisonment.
45. When the matter was before us, we severally cautioned the appellant that if he proceeded with his appeal and it was unsuccessful, the Court would have no choice but to revert to the only lawful sentence under section 296(2), namely, the death penalty. The appellant indicated that he fully understood our warnings but that he was keenly intent on arguing his appeal. Having so warned him on the record, and his appeal having failed, we hereby reverse the decision of the High Court to substitute the appellant's sentence to life imprisonment. We hereby reinstate the death penalty as initially imposed by the trial court.
46. The upshot is that we find that the appeal lacks merit and we dismiss it in its entirety. We also substitute the life sentence imposed by the High Court and uphold the death sentence imposed by the trial court on 13<sup>th</sup> November, 2007.
47. Orders accordingly.

**DATED AND DELIVERED AT KISUMU THIS 7<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**

