Ngigi v Republic (Criminal Appeal 7 of 2020)
[2025] KECA 1364 (KLR) (25 July 2025) (Judgment)

Neutral citation: [2025] KECA 1364 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 7 OF 2020

PO KIAGE, J MOHAMMED & WK KORIR, JJA

JULY 25, 2025

BETWEEN

MOSES KAMAU NGIGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the judgment of the High Court at Nairobi (Ochieng & M. Msagha, JJ.) dated 13th May 2018 in HCCRA No. 442 of 2008)

JUDGMENT

1. This appeal was previously heard by Nambuye, Sichale & Kantai, JJ.A. on 23rd February 2022 and reserved for judgment. Nambuye, J.A, retired before the judgment could be delivered. However, the judgment could not be delivered as envisaged by rule 34(3) of the Court of Appeal Rules because the remaining learned Judges could not agree on the fate of the appeal. This explains why the appeal was listed afresh for hearing before us.

2. Moses Kamau Ngigi, the appellant, was convicted on two counts of robbery with violence contrary to section 296 (2) of the *Penal Code* and sentenced to suffer death. He was also convicted of stealing contrary to section 275 of the *Penal Code*, and as expected, the sentencing was held in abeyance. His appeal to the High Court was unsuccessful, and undeterred, he is now before us on a second appeal.

3. In his memorandum of appeal dated 25th January 2022, the appellant raised 5 grounds of appeal, to wit: that the High Court relied on unsubstantiated evidence pertaining to the alleged recovery of the stolen items; that the High Court failed to discharge its mandate as a first appellate court; that the High Court erred in convicting him without evidence of the weapons used; that the evidence of visual identification was not free from error; and, that the High Court erred in convicting him based on the manner of his arrest.

4. In summary, the evidence that was presented to the trial court was that on 23rd April 2008 at about 5.00 a.m., Prisca Njeri Gitau (PW1) was leaving her house in Kawaida area within Kiambu County for Gikomba market in Nairobi City. As usual, she was being escorted to the main road by her watchman, Boniface Ngui (PW2). On the way, they were stopped by 6 men who ordered them to hand over the cash they had. PW1 gave out Kshs. 2,200 and a Nokia 2600 mobile phone with Kshs. 110 at the back. The gang then ordered them to walk back to the house, as the money they had given was insufficient. Back in PW1's house, they made PW2 to lie on the floor and took from him his Ericson mobile phone plus its SIM card. Two of the robbers went with PW1 into the bedroom where she handed them Kshs. 40,000, which she had kept in her suitcase. The robbers then grabbed a Sanyo television set and a Meko gas cylinder and left, locking the two inside the house.

5. As the robbers left the premises, the victims raised an alarm, awakening David Kuria Gitau (PW4), who was a brother and a neighbour to PW1. PW4 switched on his alarm, which attracted Sergeant Fredrick Namu (PW5) and Corporal George Odhiambo (PW6), who were on patrol nearby. The police officers spoke to the victims, who gave them a description of the attackers. PW5 and PW6 then went back to the main stage at Kawaida, where they arrested the appellant together with 3 others. During the arrest, they searched the appellant and recovered from his pocket a Nokia 1600 mobile phone. The suspects were driven back to the scene, where PW1 was able to identify the appellant. Thereafter, the appellant led the police officers to his house, where PW1's gas cylinder and television set were recovered. Also recovered was a mountain bike, which had been earlier stolen from PW4, and two pangas that had been used in the robbery.

6. In affirming the conviction of the appellant, the High Court held that the doctrine of recent possession was properly invoked by the trial court and that the appellant was linked to the offences as he failed to explain how he came into possession of the gas cylinder, Sanyo television set, and Nokia 1600 mobile phone.

7. When this appeal came up for hearing on 2nd April 2025, learned counsel Mr. Kogi represented the appellant, while Senior Assistant Director of Public Prosecutions, Mr. O. J. Omondi, appeared for the respondent. Counsel had filed their written submissions and opted to rely on them, accompanied by brief oral highlights.

8. The submissions of learned counsel Mr. Kogi were dated 7th February 2021. Counsel identified two issues for determination. On the first issue, learned counsel urged that the identification of the appellant was not foolproof. Counsel referred to Wamunga vs. Republic [1989] KLR 424 in support of the proposition that where the only evidence against an accused person is that of identification or recognition, a trial court must approach the evidence with a lot of care. Counsel pointed out that since the incident took place at 5.00 am, the clothes allegedly worn by the appellant could not be the correct mode of identifying him. Adverting to Francis Kariuki Njiru & 7 Others vs. Republic [2001] KECA 58 (KLR), Mr. Kogi urged that evidence of identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. In the same breath, counsel argued that by taking the appellant to the victim's home, the arresting officers acted in an unprocedural manner, thereby vitiating the credibility of the evidence of identification.

9. The other issue addressed by Mr. Kogi was the application of the doctrine of recent possession in order to convict the appellant. According to learned counsel, the doctrine was improperly invoked in the circumstances of the case. Learned counsel referred to Isaac Ng'ang'a Kahiga & Another vs. Republic [2006] eKLR, and submitted that 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. It was

Mr. Kogi's assertion that since the items recovered from the appellant were ordinary household goods, the appellant was not under any obligation to prove that the goods were his.

10. Still hammering home his argument that the theft was not proved, learned counsel cited Andrea Obonyo & others vs. Republic [1962] EA 542 to emphasize that theft must be proven beyond reasonable doubt before convicting an accused person. Mr. Kogi urged that in this case, in seeking proof of ownership, the trial court shifted the burden to the appellant. Learned counsel maintained that the High Court did not look for corroborative evidence to sustain the conviction of the lower court. According to learned counsel, in order to rely on the doctrine of recent possession to convict the appellant, there was need for additional evidence to corroborate the identity of the appellant. Counsel relied on the case of Daniel Muthomi M'arimi vs. Republic [2013] KECA 237 (KLR) to buttress the point that in order for the conviction of the appellant for the offence of robbery with violence to hold, there was need for independent and additional evidence to corroborate and identify the appellant as one of the robbers. The case of Yongo vs. Republic [1983] KLR 319 was cited to submit that the charge was defective since the evidence adduced in respect to the identity of PW1's mobile phone was at variance with the mobile phone as described in the charge sheet. In the end, Mr. Kogi urged us to find that the offence of robbery with violence was not proved against the appellant.

11. For the respondent, learned prosecution counsel, Mr. O. J. Omondi, relied on submissions dated 21st February 2022. Regarding the evidence of identification, Mr. Omondi submitted that the same had been rejected by the High Court and was therefore no longer an issue in this appeal. Turning to the doctrine of recent possession, learned prosecution counsel submitted that the case against the appellant met all the principles and ingredients set in Isaac Ng'ang'a Kahiga & Another vs. Republic (supra). In urging that the defects in the charge were minor, Mr. Omondi moved to persuade us to adopt the reasoning of the Court in Isaac Nyoro Kimita & Another vs. Republic [2014] eKLR and JMA. vs. Republic [2009] KECA 415 (KLR), where it was held that not all defects in a charge sheet invalidate a conviction, as some defects are curable pursuant to the provisions of section 382 of the *Criminal Procedure Code*, more so where prejudice to the accused person is not discernable. In conclusion, Mr. Omondi urged us to dismiss the appeal in its entirety.

12. This is a second appeal, and our focus will therefore be on matters of law and not facts, the facts having been presumably settled by the two courts below. This jurisdiction bar is clearly expressed in section 361 (1) of the *Criminal Procedure Code*. Our interference with factual conclusions is warranted as a matter of law; only when the lower courts consider irrelevant facts, neglect relevant ones, or clearly err in their judgment. This approach has been reiterated in several decisions of this Court, including Dzombo Mataza vs. Republic [2014] KECA 831 (KLR), where it was held that:

> "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 – see Okeno vs. Republic (1972) E.A. 32. 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. We do not discern such misgivings in this appeal."

13. We have duly reviewed the record and the submissions by counsel for the parties. In exercise of our stated mandate, we discern that the following issues are for determination: whether the charge sheet was defective; whether the evidence of identity was cogent; and whether the doctrine of recent possession was properly invoked.

14. The appellant contends that the charge sheet was defective on account of the particulars of the stolen mobile phone, which was stated to be a Nokia 1600, contrary to PW1's identification of her stolen phone as a Nokia 2600. The respondent, on the other hand, argues that this was a minor discrepancy curable under section 382 of the *Criminal Procedure Code*. Addressing this issue, the High Court held as follows:

> " That submission cannot alter the fact that the evidence tendered by the complainant was a departure from the particulars specified in the charge sheet. Surely, this is not a failure to specify a particular model in the charge sheet. It is a matter of giving particulars of a model that was different from that which the complainant lost."

15. After so finding, the High Court nevertheless proceeded to affirm the appellant's conviction not on the basis of the evidence regarding the phone, but on account of the unexplained possession of a Sanyo television set and a Meko gas cylinder. We have not been asked by the respondent to reverse the holding by the first appellate court as regards PW1's mobile phone. In addressing this issue, we will therefore have to be careful so as not to determine whether the conclusion by the learned judges was right or wrong. The question, perhaps, should therefore be whether the misdescription of one item out of several listed items should vitiate a charge sheet.

16. Section 134 of the CPC, which makes particulars of the charge an integral part of the charge sheet, provides as follows:

> " Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

17. A charge can be defective when it is at variance with the evidence adduced at trial. The learned Judges of the High Court cannot be faulted for concluding that the evidence adduced in relation to the stolen phone was at variance with the phone described in the charge sheet. While the charge specified the phone as a Nokia 1600, the evidence of PW1 disclosed that it was a Nokia 2600. We must then consider whether, though the mobile phone testified to was different from the one stated in the charge, the conviction of the appellant should be upheld. This line of inquiry aligns with section 382 of the *Criminal Procedure Code* which provides that no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the charge, unless the error, omission or irregularity has occasioned a miscarriage of justice.

18. As we have already pointed out, the particulars of the charge herein contained 4 stolen items out of which only the Nokia phone was misdescribed. We think that the charge sheet in this case properly put the appellant on notice as to the nature of the offence that he faced and he cannot be heard to say that he was confused as to the offence that he faced because of the misdescription of the phone. Furthermore, the conviction was affirmed on the basis of the other stolen items and not the phone solely. We, therefore, find that even though the charge was said to have been defective to the extent that the model of the stolen phone was different from that which was confirmed by PW1 to have been stolen, the defect did not occasion a miscarriage of justice to the appellant. Exclusion of the mobile phone still left other items unaccounted for and the appellant was correctly convicted in respect of those other items. This ground of appeal is, therefore, found to be without merit and dismissed.

19. Turning to the question of the evidence of identification, as submitted by learned counsel, Mr. Kogi, we agree with Mr. Omondi for the respondent that both the trial court and the High Court noted the anomalies in how the appellant was arrested and identified. Indeed, a review of the judgment of the High Court shows that the learned Judges did not rely on the evidence of identification to affirm the conviction of the appellant. We will therefore not belabour this ground of appeal.

20. At the centre of the appellant's appeal is his challenge to the application of the doctrine of recent possession to affirm his conviction. Mr. Kogi, for the appellant, insisted that, without evidence to corroborate the alleged possession of stolen goods, invoking the doctrine of recent possession amounted to shifting the burden of proof to the appellant to explain the source of what he termed as "ordinary household items".

21. Mr. Kogi placed reliance on Daniel Muthomi M'arimi vs. Republic (supra), which we have read and appreciated its tenor and import. We, however, must point out that the circumstances in that case were different from the ones before us. In that case, the charge of robbery with violence was set aside due to lack of direct evidence linking the appellant to the offence and also on the grounds that no evidence was adduced to substantiate the claim that the appellant was armed with dangerous weapons.

22. In contrast, in the appeal before us, when the independent parts of the evidence are put together, they form a complete chain pointing to the appellant as one of the thieves. Here, the appellant was arrested with 3 others and taken to the scene of crime. Shortly thereafter, he led police officers to a house from where the gas cylinder and a Sanyo TV set were recovered. Also recovered were two pangas, which the appellant indicated were used during the robbery. DW5, the appellant's father, testified that the items were indeed found in the appellant's house and further that the appellant and the 2nd accused person at the trial showed the police where they had hidden the two pangas used in the robbery, which pangas were produced and identified before the trial court. We appreciate that the father of the appellant was an accused person at the trial and his evidence should therefore be treated with the caution attendant to the evidence of an accomplice. However, the appellant is on record as having asked for the release of his father on 26th May 2008, implying that he was aware of the innocence of his father. The evidence of DW5 was, therefore, credible in the circumstances. Additionally, PW5 and PW6 confirmed the recovery of the stolen items and pangas, with the guidance of the appellant, from the house he had led them to.

23. Turning specifically to the question as to whether the application of the doctrine of recent possession amounted to unlawfully shifting the burden of proof to the appellant, we only need to quote the Court in Daniel Muthomi M'arimi vs. Republic (supra), a decision relied on by counsel for the appellant, wherein it was held that:

> " The appellant contends in his appeal that the trial magistrate and the High Court erred in shifting the burden of proof upon him. We do not agree; both the trial magistrate and the learned Judges did not err in requiring the appellant to offer an explanation as to how he came to be in possession of the cell phone. Recently, this Court in Peter Kariuki Kibue Vs Republic, Criminal Appeal No. 21 Of 2001 At Nairobi (unreported) dealt with a similar matter where the appellant was found in possession of recently stolen items and he failed to give a satisfactory explanation as to how he came by them. This Court stated that:
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> " The appellant was in law duty bound to offer a reasonable explanation as to how he came to be in possession of the items, otherwise than as the thief or guilty receiver. This is a rebuttable presumption of law based on the provisions of Section 119 of the *Evidence Act*""

24. The holding above dispels the appellant's submission with regard to the alleged shifting of the burden of proof, and we only need to add that the holding is in line with the provisions of section 111 of the *Evidence Act*.

25. Having said the foregoing, the question then is whether the evidence pointed to the appellant as one of the robbers or whether he was a mere possessor of the stolen items. In this case, both the trial court and the first appellate court applied the doctrine of recent possession to find the appellant guilty of robbery with violence. In Sakwa vs. Republic [2023] KECA 732 (KLR), the Court explained the manner in which the doctrine of recent possession should be invoked as follows:

> " The cited authorities lead us to the conclusion that whether the appellant was a thief or just a possessor of the stolen items is a matter of fact which was for determination by the trial court and subject to review by the first appellate court. To aid in determining this aspect, it was necessary for the prosecution to establish that, first, the appellant was in possession of stolen items; second that upon considering all the relevant factors, the court was satisfied that the items belonged to PW1; third, that the items were stolen from PW1 during the robbery; and fourth, that the items were recently stolen. Next, the trial court was required to consider whether the appellant put forth a plausible explanation as to how he came into possession of the items. We must however appreciate, as was done by the courts in the authorities already cited, that such an explanation must not necessarily be satisfactory but should be reasonable. Therefore, where a reasonable explanation is put forth, then the doctrine of recent possession should not be invoked."

26. We concur with the above statement of the law. In applying the methodology above, there was no doubt that the gas cylinder and the Sanyo television, set upon which the conviction was based, were found in the appellant's house. The record also shows that PW1 was able to identify marks she had inscribed on the Sanyo television set, thereby confirming her ownership of the same. It was therefore safe for the two courts below to conclude that the gas cylinder was stolen at the same time as the television set. Concerning the bicycle upon which the offence of stealing was pegged, PW4 was able to show the trial court a reflector which had fallen off the bicycle before it was stolen and which his son had kept. He also testified that at the time the bicycle was stolen, its front tyre was deflated, and the bicycle was indeed recovered in that state.

27. The record also shows that the recovery of these items was at about 5.30 a.m., not so long after the robbery had taken place. The period between the robbery and the recovery of the items was hardly one hour, and there was no room for the possibility of the items having exchanged hands for money.

28. Finally, we observe that despite the appellant laying claim to the gas cylinder and television set, the two courts below found the claim unsatisfactory. Under sections 119 and 111 of the Evidence, the learned Judges correctly arrived at that conclusion. By holding that the appellant did not establish his claim to the goods, they were not shifting the burden of proof but were merely expecting the appellant to put forth an explanation which would have swayed them to accept the possibility that the items were not stolen, as had already been established by the prosecution. He did not do so.

29. Consequently, we arrive at the inevitable conclusion that the two courts below did not err in their appreciation and application of the doctrine of recent possession. The appellant was correctly linked to the offences in counts 1, 2, and 3, and the offences charged therein were proved against the appellant.

30. Before we conclude, we note that in one of the grounds of appeal, the appellant hinted that the offence of robbery with violence was not proved. The ingredients of the offence of robbery with violence as

legislated under section 296(2) of the *Penal Code* were laid bare in Johana Ndungu vs. Republic [1996] eKLR 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 are pre-supposed 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."

31. That the prosecution is not obliged to prove each of the three elements was stressed in Dima Denge Dima & Others vs. Republic [2013] KECA 480 (KLR) as follows:

> " The elements of the offence under Section 296 (2) are, however, three in number and they are to be read not conjunctively, but disjunctively. One element is enough to found a conviction."

32. In the case at hand, PW1 and PW2 were clear in their evidence that the people who stole from them were more than one, armed with a firearm and pangas, and threatened them with violence. Although the prosecution was not required to prove each of the ingredients, the three ingredients of the charge of robbery with violence were all present and proved. We, therefore, find it difficult to follow the appellant's argument that the High Court erred by affirming his conviction without "evidence of the weapons used." In short, the appeal against conviction is without merit and is hereby dismissed.

33. Finally, we note just for the record that the sentence imposed upon the appellant was not a subject of this appeal. We will therefore make no comments on the death sentence meted upon the appellant.

34. The upshot is that this appeal is without merit and is for dismissal in its entirety. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JULY, 2025.

P. O. KIAGE

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR