Ndwiga v Republic (Criminal Appeal 46 of 2015)
[2025] KECA 1224 (KLR) (4 July 2025) (Judgment)

Neutral citation: [2025] KECA 1224 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 46 OF 2015

S OLE KANTAI, JW LESSIT & AO MUCHELULE, JJA

JULY 4, 2025

BETWEEN

ANTHONY KABUTHU NDWIGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Embu (F. Muchemi & B. Bwonwonga, JJ.) delivered on 13th May, 2015 in H.C. CRA No. 9 of 2014)

JUDGMENT

1. This is a second appeal from the original conviction and sentence of the appellant, Anthony Kabuthu Ndwiga by the Principal Magistrate's Court at Siakago on a charge of robbery with violence contrary to section 296(2) of the *Penal Code* it being alleged that in company of another (this other was acquitted at trial) on the night of 7th and 8th June, 2013 at Kiritiri Township, Mbeere South, Embu while armed with dangerous weapons namely rungus and pangas they robbed Peter Njeru Nyaga cash Kshs.55,776, two mobile phones make Nokia 1280 serial number 35633XXXXXX3442 and Vodafone serial number not known all valued at Kshs.2,800 and that immediately after the time of such robbery they used actual force on the said person.

2. Count 2 of the charge was on assault causing actual bodily harm contrary to section 251 of the said Code where it was alleged that on the same date at the same time they assaulted the said Peter Njeru Nyaga thereby occasioning him actual bodily harm.

3. On Count 3 they were charged with handling stolen goods contrary to section 322 (2) of the said Code it being alleged that on 29th June, 2013 at Kariobangi North area, Nairobi otherwise than in the course of stealing they dishonestly received one mobile phone make Nokia 1280 serial number 35633XXXXXX3442 knowing or having reason to behave it to be stolen goods the property of Samuel Njiru Kagondu. The appellant was convicted on Counts 1 and 2 and sentenced to death on the charge

of robbery with violence and the other accused was acquitted. There was no sentence on the conviction on Count 2. The appellant appealed to the High Court of Kenya at Embu but his appeal was found to have no merit in a judgment by Muchemi and Bwonwonga, JJ. delivered on 13th May, 2015, findings which provoked this appeal.

4. Being a second appeal our mandate is provided by section 361 (1)(a) *Criminal Procedure Code* which limits our jurisdiction to consider only issues of law if we find that there are such issues of law raised in the appeal. We are to resist the temptation to consider matters of fact which have been tried by the trial court and re- evaluated on first appeal unless we are to find that the findings reached would not be made by a reasonable tribunal or, looked at as a whole, they are perverse. This Court, considering that mandate had this to say in Stephen M'Irungi & Another vs. Republic [1982 – 88] 1 KAR 360:

> Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed finding of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

5. We visit facts of the case briefly to see whether the two courts below carried out their mandate as required in law.

6. The prosecution case was through evidence of 5 witnesses.

7. Peter Njeru Nyaga (Njeru -PW1) a resident of Kiritiri was an attendant at Amazon Petrol Station owned by Samuel Njiru Kagondu (Kagondu – PW3). He was on duty at the said station on the night of 7th and 8th June, 2013 when at 3 a.m. a motor vehicle make Probox drove into the said station and he dutifully attended to it. The driver instructed him to supply fuel worth Kshs.500 which he did but as he did so a person alighted from the car and held him by the shoulders while placing an unnamed weapon on his head. He saw in all 6 men one of who demanded money, another person forcefully removed money from all his pockets whereafter they frog matched him to the office, ordered him to lie prostrate and they broke desk drawers looking for money. He heard screams outside, all the men but one left to go and investigate, the one left behind followed his accomplices and they all fled the station in the Probox car. He went outside and found the watchman (Anthony Namu – Namu PW2) lying on the ground seriously injured and bleeding profusely. Police later arrived at the station. In his own words:

> " ...I did not see the driver. There was light from electricity. I was sleeping. The man who took money from my pockets was short and black. I did not see his face fully I cannot recognize him. I think the man is in court. I think it is that man (points at accused). I saw his eyes..."

8. He further testified that he was robbed of Kshs.38,000 and a Nokia 1280 phone which phone belonged to his employer (Kagondu) and which he recognized in court as the phone that was stolen during the robbery.

9. Namu, the watchman, narrated how on that night he saw Njeru being pushed by people who had come to the station and upon him going to investigate he was cut with a panga and also injured on the leg making him fall to the ground. He lost consciousness and came to at Embu General Hospital where he was admitted for 1 week and thereafter discharged. He identified P3 Form and treatment notes issued by police and the said hospital. According to him there were 3 robbers; there was electricity light but he did not know who had attacked him.

10. Kagondu, the station owner who resided in Nairobi upon being informed of the robbery travelled to Kiritiri on 10th June, 2013, a few days after the incident. Upon visiting the station his employee Njeru narrated to him how robbers had posed as customers but robbed the station. Njeru told him that he was robbed of Khs.36,000 and 2 mobile phones one being a Nokia 1280 and the other Vodafone. He identified in court a Nokia 1280 as one that had been stolen from Njeru and gave its serial number as 3563XXXXX413422, the same one as the one in an amended charge sheet. This issue will take on some importance later in this judgment because of an application made at the end of the prosecution case for amendment of the original charge sheet.

11. Kagondu further testified that upon arrival at Kiritiri and upon visiting the police station he had given serial numbers of both phones to the police; that the police traced one phone electronically and it was found with the 2nd accused in the case who informed police that she had been given the same by the appellant (who was her boyfriend or husband).

12. Dr. Majala Mwangombe (PW4) of Embu Provincial General Hospital filled P3 Form for Namu after examination where he had found him to have suffered injuries involving external wound on the head and other injuries and he had scars on the head caused by a hard object. He produced P3 Form into evidence.

13. The last prosecution witness was Corporal David Otieno of Kiritiri Police Station, the investigations officer in the case. He with his colleagues upon being ordered to do so by his superior had visited the petrol station where they found Namu lying in a pool of blood. Njeru informed them that 6 attackers had come to the station where they robbed him of Kshs.35,776, a Vodafone and a Nokia 1280 with the serial number already given in this judgment.

14. Upon investigations in Embu Corporal Otieno was directed by Safaricom personnel that the signal for the phone they were looking for was at Manyatta estate but they did not find it when they visited Manyatta. Kagondu later visited the police station in company of the 2nd accused (who was acquitted) who had one of the stolen phones Nokia 1280. They all went to Embu, that person called the appellant and the witness arrested the appellant and that other person after establishing that it was the appellant who had given the phone to that person, his girlfriend. The appellant informed him that he had obtained the phone from a third party as security for a Kshs.400 loan. He produced the Nokia phone and a Receipt as exhibits in the case. In cross-examination by the appellant he denied taking a phone from him and also denied that he had taken a phone sale agreement from the appellant.

15. That was the last witness called by the prosecution and at that point the trial court was addressed as follows by the prosecutor:

> " Pros: I apply to amend the charge sheet so that I can correct the serial No. of the mobile phone that was stolen.
>
> Accused 1: I object to the amendment. The amendment should have been made before the case started.
>
> Accused 2: I have no objection.
>
> Court: Under section 214 CPC the court is empowered to allow a substitute or amendment of a charge sheet before the closure of the prosecution case.
>
> I therefore allow the application. The accused to take plea in the new charge sheet."

16. Both accused persons denied the charges read out to them, pleas of not guilty were recorded for each count and after the right to recall witnesses was explained to them neither of them wished to recall

any of the witnesses. There is no record that the prosecution case was closed but what followed was a ruling where the trial magistrate found that the prosecution had established a prima facie case and the accused were called upon to make their respective defences.

17. What followed were various adjournments where the case could not proceed for hearing for one reason or other. By the time the case came up for defence hearing again a new magistrate (A. M. Makau, Ag. SRM) had taken over. Rights under section 200 *Criminal Procedure Code* were explained and both accused elected that the case proceed from where it had reached.

18. In a sworn statement the appellant who told the court that he was a charcoal seller who also operated a boda boda (motor cycle) business that he was called on phone to Embu where he was arrested after joining his wife the 2nd accused.

19. He stated in part:

> ...The mobile phone involved herein, I recall on 25.5.2013 my customer who sold fish, had come to borrow me Kshs.400/= to pay hospital bills for his sick child. He left this mobile Nokia 1280 as security its serial Number is not what is indicated in the charge sheet, it is Serial No. 05XX312. I explained to the police how the mobile phone had come to my possession, the police retained my Techno Tv 30 phone. I had given 2nd accused that (p exhibit 1) phone for her use."

20. He testified in cross examination:

> " ... The person who gave me the phone as security is called Patrick Mutinda, he is a fellow business man. ... We signed an agreement with him, when he left the mobile phone with me in exchange of Kshs.400/-. I do not have the agreement because it was taken by the police. ..."

21. The co-accused in a sworn statement stated that she was given a Nokia 1280 phone by her husband, the appellant, after her own phone fell into water while visiting him at his home in Runyenjes. She used the phone for 26 days and was arrested thereafter and charged in court.

22. On the foregoing evidence, the appellant was convicted while his co-accused was acquitted.

23. The appellant was dissatisfied with the findings of the magistrate; was dissatisfied when his first appeal was dismissed leading to this appeal where 8 grounds of appeal are set out in the homegrown "Grounds of Appeal." The Judge is said to have erred in law in upholding conviction while relying on inconsistent evidence; that the charges were not proved as required; that:

> ...the appellate judge erred in law while upholding my conviction without putting in mind that the said phone which was said to have been stolen from the complaint (sic) that I had raised an issue o (sic) how I had come in possession of the same...."

24. It is stated in other grounds that the Judge erred in upholding conviction without considering that the appellant had produced a written agreement in regard to the said phone during the hearing at the trial stage; that the Judge did not comply with section 169(1) *Criminal Procedure Code* in regard to the appellant's defence; that the charge sheet was defective as it did not disclose when the case was booked. The appellant states in the penultimate ground that the Judge erred in law and facts in failing to consider that the arresting officer and personnel from Safaricom were not called and, in the last ground, that the Judge erred in not noting that evidence adduced was not supported by documentary evidence.

25. When this appeal came up for hearing before us on 12th March, 2025 learned counsel Mr. Karanja Maina appeared for the appellant while learned State counsel Mr. Naulikha appeared for the respondent. In a highlight of written submissions counsel for the appellant submitted that Njeru and Namu were not able to identify the appellant at an identification parade and therefore identification of the appellant had not been proved. We observe here that this submission is misplaced as there is no record of an identification parade having been conducted at all in the trial.

26. In further submissions counsel for the appellant thought that the two courts below had failed to note that a receipt in respect of the alleged stolen phone was issued to one Nyaga. Counsel submitted that it was wrong for the two courts to rely on electronic evidence on how the co-accused was traced and arrested without calling evidence from mobile telephone operator Safaricom. Counsel wondered why it was necessary for the courts below to convict the appellant on both counts of robbery with violence and also the offence of assault causing actual bodily harm submitting that the conviction on the charge of robbery with violence which carried a mandatory death penalty should have sufficed. Counsel submitted in conclusion, that the courts below were wrong to rely on the doctrine of possession of recently stolen goods in the circumstances of the case.

27. Then it was Mr. Naulikha's turn to respond.

28. In a highlight of written submissions counsel supported the courts below which, according to counsel convicted the appellant based on the doctrine of recent possession. Counsel submitted that the appellant was unable to explain how he came to be in possession of a recently stolen phone. Counsel submitted that the High Court on first appeal re-analysed the evidence and came to its own conclusion that the conviction of the appellant was based on proper analysis of the evidence and the law. According to counsel the law allowed the prosecution to amend a charge sheet at any time before closure of its case.

29. We have considered the record, submissions made and the law and this is how we determine this appeal.

30. As we have indicated our mandate is to consider issues of law only.

31. Looking at the grounds of appeal raised by the appellant we recognize the issues of law to be: whether the charges facing the appellant were proved to the required standard in law; whether there was inconsistent evidence and whether such inconsistency prejudiced the appellant; whether failure to call evidence from mobile phone operator Safaricom affected the prosecution case and whether the doctrine of recent possession was properly applied by the courts below.

Were the charges against the appellant proved to the required standard?

32. There is no doubt that Njeru and Namu were attacked on the night of 7th and 8th June, 2013 where Namu was seriously injured and was admitted to hospital for about 1 week. There is no doubt also that Njeru was robbed of money although there are inconsistencies on how much money was stolen – Njeru said it was Kshs.38,000, Kagondu testified that the sum stolen was Kshs.36,000 while the investigating officer testified that the sum stolen was Kshs.35,776.

33. Namu testified that 3 people entered the petrol station; that there was electricity light; that he saw them push Njeru and when he went to investigate he was attacked suffering serious injuries. He did not recognize any of the robbers.

34. According to Njeru there were 6 robbers and he did not recognize any of them but he thought the appellant was one of them:

> " ... I cannot recognize him. I think the man is in court. I think it is that man (points at accused 1)..."

35. The trial magistrate considering that issue found that Njeru and Namu had not given a description of the robbers to the police; that Njeru did not explain what made him think that the appellant was one of the 6 robbers.

36. The High Court did not consider the issue of identification but relied purely on the doctrine of recent possession.

37. The trial magistrate was right to find that recognition had not been proved by the prosecution as dock identification could not be used to found a conviction, dock identification being worthless in a criminal trial. Considering the question of dock identification this Court in Stephen Matu Kariuki & 2 Others vs. Republic [1996] eKLR considered the issue at length as follows:

> " With respect to the dock identification of the appellants, the learned Principal Magistrate was not oblivious of the related guidelines laid down in R v Turnbull (1976) 3 WLR 445 and which are applied in Kenya. He put it thus:
>
> On the question of identification, Lord Widgery, L.C. in the English case of Regina Vs TURNBULL (1976) 3 WLR 445 laid down some 9 guide lines to be used by the Judges and others in cases of identification. These guide lines were adopted in Kenya by Sachdeva J, and Hancox J, as he then was, in the case of REUBEN TAABU and others Vs Republic Nairobi Cr. App. 480, 208, and 209/78 (unreported).His Lordship posed the following queries:-
>
> > How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or press of people?
> >
> > Had the witnesses ever seen the accused before? How often? If occasionally, had he any specific 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 witnesses when first seen by them and his actual appearance?'".
>
> Turnbull was again considered by this Court in Gabriel Njoroge v Republic (1982-88) 1 KAR 1134 at 1136 and in its judgment delivered by Platt JA, on 20th November, 1987, over four months after the delivery of the judgment of the learned judges of the High Court, the following observations with respect to dock identification which is reproduced hereunder in extenso, appear:
>
> > ... Dock identification is worthless [the court should not rely on a dock identification] unless this has been preceded by a properly conducted identification parade. A witness should be asked to give description of the accused and the prosecution should then arrange a fair identification parade.

Nearly four years later, Turnbull and Gabriel Njoroge were considered by this Court in Amolo v. Republic (1991) 2 KAR 254 where it was held that:

> Following Gabriel Njoroge v Republic (1987) 1 KAR 1134 visual identification must be treated with the greatest care and ordinarily a dock identification alone should not be accepted unless the witness has in advance:
>
> a. given a description of the assailant;
>
> b. identified the suspect on a properly conducted parade."

38. The dock identification of the appellant by Njeru was worthless and could not be relied on.

39. So there was no identification of the appellant the 2 courts below relying purely on the doctrine of recent possession to found a conviction.

40. The trial magistrate, considering that doctrine of recent possession held that the stolen Nokia 1280 phone linked the appellant to the commission of the offences as it had been recovered from his co-accused who told police that the phone had been given to her by her husband, the appellant.

41. Considering that issue the High Court on first appeal held that the appellant was found in possession of a recently stolen phone less than 3 weeks after it had been stolen; it found that his explanation on how he came to be in possession of the phone had been rightly rejected by the trial court.

42. The record shows that the appellant upon being arrested by PW5 he informed the police officer that the phone had been given to him by Patrick Mutinda as a security for a friendly loan of Kshs.400 which Mutinda required to buy medication for a sick child. The appellant stated this as PW5 testified and also challenged the said witness stating that he had shown PW5 an agreement entered between him (the appellant) and the said Mutinda relating to the said loan; that PW5 had taken that agreement but had failed to produce it as evidence in the case.

43. There is the related issue of the amended charge sheet. The whole prosecution case proceeded through the original charge sheet which stated that the Nokia 1280 phone bore serial number 05XX312. That was the charge the appellant faced until an amended charge sheet was introduced at the tail end of the prosecution case. The amendment followed after the prosecution realized from the evidence of Kagondu that the serial number of the phone stated in the charge sheet was different from the testimony of the said Kagondu and in a Receipt issued to one Nyaga. We find that the two courts below did not properly analyze this aspect of the case and that had they done so they may have most likely reached a different conclusion.

44. In view of the circumstances that led to the application to amend the charge sheet and the position taken by the appellant the justice of the case required at the very least production of the Occurrence Book to confirm the serial number recorded when a report of robbery had first been made to police.

45. We find that the explanation given by the appellant on how he came to be in possession of the phone was reasonable. He explained that it was given to him as security for a friendly loan he advanced to a person whose name he gave; he even explained that he had entered into a written agreement with that person in relation to the loan and the phone but that the agreement had been confiscated by the police and probably destroyed. This was a reasonable explanation which the courts below erred by not giving it the weight it carried and required. In view of this finding and considering that both courts below convicted the appellant purely on the doctrine of possession of a recently stolen phone the prosecution case was shaky and that conviction was not safe in the circumstances at all.

46. The appellant says that the courts below were wrong to rely on inconsistent evidence. There is merit in this complaint. The prosecution did not make any attempt to synchronize the evidence - according to Njeru and the investigation officer there were 6 robbers while Namu only saw 3; there was inconsistency in the amount of stolen money – according to Njeru it was Kshs.38,000, Kagondu testified that it was Kshs.36,000 while the investigation officer testified that it was Kshs.35,776.

47. The prosecution's case was that upon receiving complaint the police contacted mobile service provider Safaricom whose personnel tracked the stolen phone to Manyatta estate in Embu. The prosecution did not call any witnesses from the said phone service and such evidence given by PW5 should not have been considered by the trial court in view of the elaborate procedure provided in the *Evidence Act* on production and reliance of electronic evidence.

48. We think that had the High Court considered the issues we have identified and discussed in this judgment it would have found that there was a reasonable doubt on whether the appellant had been properly convicted. We find that the conviction was not safe in those circumstances. The same is hereby quashed. We allow the appeal by quashing the conviction and setting aside the sentence. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT NYERI THIS 4TH DAY OF JULY, 2025.

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

A. O.MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR