



**Hussein v Republic (Criminal Appeal 50 of 2018)
[2024] KECA 1494 (KLR) (25 October 2024) (Judgment)**

Neutral citation: [2024] KECA 1494 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 50 OF 2018
MSA MAKHANDIA, A ALI-ARONI & JM MATIVO, JJA
OCTOBER 25, 2024**

BETWEEN

ABDI RASHID ADAN HUSSEIN APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Garissa
(Muchemi, Mutuku, JJ.) dated 29th January, 2013 in HCCRA No. 3 of 2012)*

JUDGMENT

1. Abdi Rashid Adan Hussein, the appellant herein, comes before this Court by way of a second appeal, his first appeal having been dismissed by the High Court in Garissa (Muchemi & Mutuku, JJ.) on 29th January 2013. The appellant had been charged before the Principal Magistrate’s Court at Mandera with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars were that on 5th August 2011 at Township Location in Central Division within Mandera County, while armed with a knife, robbed Abdullahi Mohamed of a mobile phone make G. Tide valued at Kshs. 4,000/-, a National Identification Card, and Kshs. 2,450/- all valued at Kshs. 6,450 and immediately before such robbery used actual violence by wounding the said Abdullahi Mohamed.
2. In the alternative the appellant was charged with the offence of handling stolen goods contrary to Section 322(1) of the Penal Code. Particulars of which are not contained in the record.
3. The appellant pleaded not guilty to the charges and the case proceeded to trial where the prosecution called 4 witnesses. The appellant was placed on his defence, and upon considering the evidence on record, the trial magistrate acquitted the appellant of the offence of robbery with violence, convicted him of the lesser charge of handling stolen goods, and sentenced him to 10 years’ imprisonment. Aggrieved by the judgment the appellant appealed to the High Court at Garissa in Criminal Appeal No. 3 of 2012, and in its determination the High Court set aside the conviction of handling stolen



goods, as well as the sentence imposed and substituted it with the main charge of robbery with violence, and enhanced the sentence to death.

4. The appellant was aggrieved by the decision of the High Court and preferred this appeal. Before we address the grounds of appeal we shall summarize the evidence that was adduced before the trial court.

PW1, Abdullahi Mohamed, testified that on 5th August 2011 at around 9:45 pm, on his way home from Jamia Mosque he encountered two persons who requested him for a gas lighter. PW1 informed them that he did not have one. As he walked away, one of them jumped at him with a knife aimed at his neck. PW1 defended himself and the knife cut his left hand. The other person went for PW1's pocket and took a phone, Kshs. 2,450 and his National Identity Card. On robbing him the two left, challenging PW1 to confront them if he had the courage.

5. Further PW1 testified that the following day he reported the incident at Mandera Police Station. Since his phone had been secured with a password, he in the company of one, Omar Yussuf (PW2) visited several stores where phone codes used to be unlocked to report the loss and to ask the shops to alert him if a phone fitting the description of his lost phone was taken to them for unlocking. After a while, a store known as "Brothers Shop," informed Omar that a phone matching the description of PW1's phone had been taken to the shop for unlocking. Following this tip, Omar contacted PW1 and they visited "Brothers Shop," where PW1 identified his phone. At the time of the theft, the scrolling button of the phone remained in PW1's pocket, while at the 'Brothers Shop', the phone he was shown had no scrolling button.

6. Further he testified that while at "Brothers Shop", they encountered the appellant who had taken the phone to be unlocked. PW1 inquired about the phone's origin, and the appellant claimed to have purchased it. They took the appellant to the Mandera Police Station alongside police officers. Thereafter they went about town with the appellant in an attempt to trace the individual who purportedly sold the phone to him, but without success. PW1 further informed the court that he also went to Mandera District Hospital where he was treated for the cut he sustained, and a P3 form was filled.

7. PW2, Omar Yusuf Maalim, a taxi driver testified that on 6th August 2011 at about 6:00 am, he was near Dido's stage, when PW1 approached him and informed him that he had been robbed during the night of cash, a phone, and his National Identity Card. PW1 also showed him an injured thumb. He offered to take PW1 around in his taxi to 6 shops that repaired phones, and in each shop, PW2 left his phone number so that they could contact him if a phone fitting the description given by PW1 was taken to the said shops. After approximately 40 minutes, he received a call from one of the shops where they had reported the loss of the phone. He asked PW1 to meet him at the shop where he had been summoned. PW2 hurried to the shop and found PW1 already there. At the shop, PW2 witnessed the appellant holding the lost phone. The appellant was questioned about the origin of the phone, and responded that the phone belonged to him. Afterwards, they requested the appellant to go with them to the Mandera Police Station, and while at the police station, the appellant claimed to have bought the phone. The appellant took four police officers, PW1&PW2 to three different places to search for the alleged seller in vain.

8. PW3, Maurice Situma, a police officer, testified that on the morning of 6th August 2011, around 8.00 am, while at the office, he received a call from the Officer Commanding Station (OCS) informing of a reported robbery and that the suspect had been brought to the station. He also learnt that the stolen phone had been recovered. He then interviewed PW1, who informed him that the previous night he had been robbed of his phone and that, he received information from a shop where he had reported the theft, that someone with a phone matching the description of his lost phone had visited the shop. He



had visited the shop and was shown the individual with the phone, he pretended that he was interested in buying the phone and when the phone was shown to him, he recognized it as his.

9. Further, PW3 testified that he apprehended the suspect and equally questioned him. The suspect offered to lead them to his accomplices, whom they never found despite the appellant taking them to various locations. He ultimately, charged the appellant with the offence.
10. PW4, Suter Walter Kimutai, a medical officer based at Mandera District Hospital testified that on 6th August 2011, a patient called Abdullahi Mohamed was brought to Mandera District Hospital with a history of having been assaulted during a robbery incident. He examined him and found injuries on his left arm. He assessed the injury as harm. He also filled out a P3 form, which he produced as an exhibit in court.
11. Upon considering the prosecution evidence, the trial court put the appellant on his defence. The appellant gave sworn evidence and denied the offence. He claimed that the case against him was fabricated; that he had purchased the phone for Kshs 1,200 from a person who approached him while working as a turn boy in a vehicle. That he took the phone to “Brothers Shop” for repairs when PW1 came claiming ownership of the phone.
12. The grounds of appeal before us may be summarized as follows; that the High Court erred in law by failing; to properly re- evaluate the evidence; to observe that the burden of proof was not discharged; to consider that the entire evidence on record was not considered in the light of the appellant’s defence and by failing to take into account the contradictions and inconsistencies in the prosecution evidence.
13. The appellant’s learned counsel Mr. Angaya, in his submissions dated 1st October 2021 submitted that there was need to establish whether the elements of the offence of robbery with violence were proved, and in support of this argument he relied on the case of Johanna Ndungu vs. Republic, [1996] eKLR, where the court set out the ingredients of the offence. He further submitted that the respondent did not prove any of the elements set out in the case; further that while it was alleged that during the robbery, two people had a knife which was considered an offensive weapon, the weapon was not recovered from the appellant and neither was it produced and identified in court.
14. Learned counsel submitted further that, in his testimony, PW1 claimed that during the robbery there were two individuals, but no specific details were provided to identify them, such as voice, physical appearance, or clothing; that neither of the two individuals were positively identified. Learned counsel relied on the case of Donald Atemia Sipendi vs. Republic [2019] eKLR, where it was held that a court must consider identification testimony with great care, especially when the only evidence identifying the accused as the perpetrator comes from one witness and submitted that none of the witnesses called by the respondent were able to identify the appellant as being present at the scene of the crime. That PW1 stated that he could only recognize the appellant as the person he found at “Brothers Shop” and not from the robbery incident; PW2 mentioned that he did not witness the robbery. Additionally, PW3, the police officer, did not testify on how the appellant was identified as the perpetrator, nor did he undertake an identification parade during investigations to ascertain and charge the appellant.
15. On whether the doctrine of recent possession was properly invoked, learned counsel relied on the case of Eric Otieno Arum vs. Republic [2006] eKLR, where the court summarized the essential elements of the doctrine of recent possession. Learned counsel contended that the appellant bore the evidential burden to provide a reasonable explanation for owning the phone and that this burden did not relieve the prosecution from proving its case to the required standard. In support of this contention learned counsel relied on the case of Malingi vs. Republic [1988] KLR 225 for the presupposition that the explanation need only be plausible. He also referred to the case of Paul Mwita Robi vs. Republic, [2010]



- eKLR, where the court held that once an accused person is found in possession of a recently stolen property, the accused has to explain how he came to have the recently stolen property.
16. He submitted further that the alleged shop attendant who called PW2 was never called to identify the phone and no receipt was produced to prove ownership; in the absence of a receipt, the court was denied the chance to assess the evidence and to make a finding on ownership. Further counsel contended that the appellant was denied the opportunity to cross-examine the witness on the identity and ownership of the phone recovered.
 17. In its submissions dated 28th January 2022, the State represented by Learned State Counsel Mr. O.J. Omondi, submitted that all the ingredients necessary for the offence of robbery with violence were established and proved. That PW1 gave evidence of how he was attacked and robbed, and that from the said evidence, it can be established that the attackers were armed with a dangerous weapon; the appellant was in the company of another; that PW1 received a cut on the left arm during the robbery a fact supported by medical evidence. In support of the propositions the State relied on the case of *Johanna Ndungu vs. Republic* (supra)
 18. On the doctrine of recent possession, the State relied on the case of *Samuel Munene Matu vs. Republic* [2004] eKLR, where the court in answering the question as to whether possession of stolen goods was sufficient to sustain a conclusion that the appellant participated in the robbery, quoted *Republic vs. Loughin* 35 Criminal Appeal R 69, where the court held that if it is proved that premises have been broken into and certain property stolen, and shortly afterward a man is found in possession of that property, that is evidence from which the jury can infer that he is the house breaker or shop breaker.
 19. The State submitted further that possession in the instant case was so soon after the commission of the offence, being the morning after the robbery and that the only logical inference to be drawn was that the appellant was one of the robbers; that though the appellant in his defence stated that he had bought the phone, the trial court in analyzing the defence did not find this statement credible and concluded that the seller of the phone may not have existed.
 20. The State further submitted that the mobile phone was properly identified by PW1 in his testimony and there was concurrent finding of fact by the two courts on this fact. The State supported the finding by the High Court that the trial court had failed to believe the appellant's defence, which meant that there was no reasonable explanation as to the possession of the phone by the appellant and the court could only have arrived at a finding of guilty for the offence of robbery with violence, and the conviction of handling stolen goods and its substitution with that of robbery with violence was sound and merited under the circumstances.
 21. We have carefully considered the record of appeal, the submissions by the rival parties, and the law. We are aware that Section 361(1)(a) of the Criminal Procedure Code limits our jurisdiction in second appeals to only matters of law. This provision has received judicial interpretation in numerous decisions of this Court such as *Chemogong vs. Republic* [1984] KLR 611, *Ogeto vs. Republic* [2004] KLR 14, and *Koingo vs. Republic* [1982] KLR 213 amongst others. In the latter case, this Court stated that: -

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless it is based on no evidence. The test to be applied on a second appeal is whether there was any evidence on which the trial court could find as it did (*REUBEN KARASI s/o KARANJA V. R.* (1956) 17 E.A.C.A 146))
 22. We are of the view that all the grounds of appeal can be collapsed into four thematic areas: (i) whether the learned judge effectively evaluated the prosecution's evidence and correctly found that the



prosecution had proved the ingredients of the offence of robbery with violence beyond a reasonable doubt; (ii) whether the prosecution's evidence was fraught with contradictions and inconsistencies, if so, the consequences thereof (iii) whether the doctrine of recent possession was properly invoked and (iv) whether the court failed to consider the appellant's defence.

23. On whether the High Court adequately evaluated the evidence, our reading of the record indicates that the High Court evaluated the evidence though it is one thing to evaluate and another to arrive at a wrong finding. There is no one style of evaluation and analysis of evidence and we do not want to fault the High Court on this score. As stated by this Court in the case of *Alexander Ongasia & 8 Others vs. Republic* [1993] eKLR:

“.....it is not enough; indeed there is no need, to loudly announce in the judgment that the evidence has been re-evaluated. Such re- evaluation must be apparent on the face of the record and if that is done, then there is no occasion to announce it.....but it is clear to us that he broadly agreed with the conclusions reached by the trial magistrate and he also found as a fact that the evidence against the appellants was overwhelming. We think he was right in his general conclusions and in the circumstances of this case, his failure to analyze in detail the evidence before the trial court did not occasion any failure of justice to any of the appellants.”

We shall later in the judgement consider whether the High Court properly evaluated the evidence.

24. On whether there were inconsistencies and contradictions in the prosecution's evidence, this issue was not raised in the High Court and is being raised for the first time in this Court. Needless to say, if there were any contradictions they did not go to the core of the evidence to affect the case and therefore the ground is not sustainable. In the case of *Richard Munene vs. Republic* [2018] eKLR, this Court stated: -

“It is a settled principle of law, however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily create some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.”

25. On the application of the doctrine of recent possession, this Court in the case of *Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic* [2006] eKLR stated as follows:

“It is trite 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. 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. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses.”

In the instant case, all the elements set above were present. PW1 was robbed; there was evidence that the phone recovered from the appellant belonged to him; he had been robbed the night before and the following morning the appellant was found with it. We therefore find no fault with the application of the doctrine upon the High Court evaluating the evidence before it.



26. Sections 295 and 296(2) of the Penal Code speak to the ingredients of the offence of robbery with violence and its punishment as follows:

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

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

27. To prove the offence of robbery with violence the prosecution must establish that the suspect stole, he was in the company of another, they were armed, and before or after the commission of the offence there was a threat or use of force.

The trial court on analyzing the evidence did not find any evidence that pointed to the appellant as having been one of the robbers. This is what the trial court stated:

“...First, the complainant conceded that the incident took place at night and therefore he does not know the identity of the attackers, thus there is no direct evidence linking him to the robbery. In as much as accused was found in possession of the phone just hours after the robbery, there is still some slim chance that the accused himself did not participate in the robbery.

Secondly, PW1’s evidence was supported by that of PW2 that the accused was the one who had PW1’s stolen phone. Even accused himself in his defence admitted that he had the phone, saying he had bought it from Mohamed Hassan. However, Pw1, 2, and 3 all said that the accused took them around town to different places in search of the seller of the phone, but in vain. That shows that such a person may not have existed, but if he existed the accused was covering him up. When the accused eventually named the seller during cross-examination, it failed to establish why the accused did not take PW1, 2 & 3 up to the alleged seller’s house. Besides, even if the accused were to be believed to have bought the phone at such an early hour with defects it had, especially the code, is only indicative that the accused did not believe that the phone really belonged to the alleged seller. Besides the accused to have bought a phone worth 4,000 at only Kshs. 1200 suggests that the accused knew the phone was not legitimately procured by the alleged seller.”

28. From the summation above one can see that the trial court was grappling with the evidence before it; and had failed to consider that the appellant was in recent possession of the stolen phone and admitted as much. Further, the appellant had failed to pinpoint the person who sold the phone to him which created doubt in his defence. The evidence that the PW1 was robbed the night before was not controverted. PW1 testified that in the process of being robbed, he was cut by a knife the robbers possessed. A P3 form produced in evidence established the injuries sustained. PW1’s evidence was fortified by the appellant’s admission that he bought the phone the morning after the robbery. PW1’s description of the stolen phone fitted the phone in possession of the appellant; notable was the missing button that PW1 had with him. The offence of robbery was no doubt established, and fortified by the fact that the appellant had the stolen phone and could not reasonably explain how he came by it leading to the inference that he was one of the robbers.



29. Having made the above finding, we are satisfied that the High Court adequately analyzed the evidence, came to a logical conclusion and rightly convicted the appellant.
30. Section 354 (i), (ii) and (iii) of the Criminal Procedure Code empowers the High Court in the following terms:
3. The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may—
 - a. in an appeal from a conviction—
 - i. reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or
 - ii. alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or
 - iii. with or without a reduction or increase and
 - iv. with or without altering the finding, alter the nature of the sentence.”
31. The law grants immense powers to the High Court as seen above, however, the said powers have to be exercised judiciously and in a manner that the convict/appellant is accorded a fair hearing. The issue has been numerously discussed and a position taken by this Court as will be seen in the following cases, J.J.W. vs. Republic [2013] eKLR, where this Court stated:

“It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 354

3. (ii) and (iii) of the Criminal Procedure Code. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal.” (Emphasis added)

In the case of Sammy Omboke & Another vs. Republic [2019] eKLR, this Court said as follows:

“In the instant appeal, there was no cross-appeal by the prosecution for enhancement of sentence before the High Court nor was there a warning to the appellants by the court that the sentence meted upon then (sic) could be enhanced; and there was no notice of enhancement. Guided by the judicial pronouncements of this Court above, we find that the learned judge erred in enhancing the sentence meted out on the appellants. In the absence of a cross-



appeal and notice and or warning the judge had no jurisdiction to enhance the sentence.”

32. There was no cross-appeal by the State, and neither was there any formal notice served on the appellant. The record shows that the State had indicated that it would be asking the court to enhance the sentence; rather casually and the matter was then adjourned. Later within its submissions, the State revisited the issue. We think that from a sentence of 10 years’ imprisonment to an enhancement of death sentence, the request ought to have been formally made by way of cross- appeal or a formal notice to the appellant or the State having indicated its intention in the manner it did, the court should have warned the appellant at the start of the appeal of the request and its implication. Anything short of the above in our view was prejudicial to the appellant.
33. In the end in as much as we find the conviction by the High Court to have been proper, we think that the 10 years’ imprisonment for the offence committed was fair and just in the circumstances enumerated above. The appeal partially succeeds, we set aside the death sentence and revert to the earlier sentence of 10 years.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF OCTOBER, 2024.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

