



**Anyasi v Republic (Criminal Appeal 30 of 2018)  
[2024] KECA 1589 (KLR) (8 November 2024) (Judgment)**

Neutral citation: [2024] KECA 1589 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 30 OF 2018  
PO KIAGE, F TUIYOTT & JM NGUGI, JJA  
NOVEMBER 8, 2024**

**BETWEEN**

**SAMUEL ODHIAMBO ANYASI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at Siaya (J.A. Makau, J.) dated 29th September 2016 in Criminal Appeal No. 16 of 2015)*

**JUDGMENT**

1. Samuel Odhiambo Anyasi (the appellant) was convicted of two counts of robbery with violence, the particulars being:-

“Count 1:

On the 16<sup>th</sup> day of July 2013 at Got-Nanga market in Ugenya District within Siaya County jointly, while armed with crude weapons namely pangas and rungus, robbed Maurice Owuor Onyor of unknown amount of money, mobile phone make Nokia Asha 205 serial number 35508105152xxxx/16, mobile phone make Nokia 1200 s/no. 3536500194xxxx/8, Sony Music System and LG DVD all valued at kshs.200,000/- and immediately at the time of such robbery fatally wounded the said Maurice Owuor Onyor.

Count 2:

On the 16<sup>th</sup> day of July 2013 at Got-Nanga market in Ugenya District within Siaya County jointly, while armed with crude weapons namely pangas and rungus, robbed Jamilla Abdalla of mobile phone make H72 s/no. 357072/21505760, a bag and clothes all valued at



kshs.6,900/- and immediately at the time of such robbery used actual violence to the said Jamilla Abdalla.”

2. On a first appeal before the High Court (Makau, J.), the appellant was unsuccessful. In dismissing the appeal, the High Court, in a judgment dated and delivered on 29<sup>th</sup> September 2016, found that whilst the speed and circumstances of the incident made identification of the appellant difficult, the doctrine of recent possession was properly invoked by the trial court. As there is no cross appeal, we restrict ourselves to the evidence which the High Court found to be dispositive.
3. Cpl. Benson Ndambuki (PW4) was tasked with investigating the robbery. Among the properties stolen by the robbers were three mobile phone handsets; Nokia Asha 205; Nokia 1200 and Nokia H72. In his lifetime, the deceased subscribed to telephone Number 0712 32xxxx while Jamila Abdalla (PW1) to 0726 51xxxx and Brian Oduor Owuor (PW2) to 0704 00xxxx. PW2 sought the help of Safaricom, a renowned mobile service provider in Kenya, who gave the following information: the IMEI (International Mobile Equipment Identity) number for the deceased’s phone handset was 35365001945xxxx and that of PW1 was 35707212150xxxx. The first handset was recovered from William Mwenje Maloba (accused 2) while the latter was recovered from Nicholas James Mukhaya (accused 4).
4. On confronting accused 2, accused 2 told him that the appellant had sold the deceased’s handset to him. With this information, the investigating officer arrested the appellant and recovered from him a mobile handset with telephone number 0716 04xxxx. Regarding PW1’s handset, the investigating officer found it in possession of accused 4. It was then the testimony of the officer that:

“ They gave me the phone number of accused 1.”

5. Reports on call logs from Safaricom show that the deceased’s handset had been used to make a call from telephone number 0716 04xxxx on 17<sup>th</sup> July 2013 at about 07.58 hours soon after the deceased had been robbed and a call from the same telephone number had been made from the handset belonging to PW1 on 17<sup>th</sup> July 2013 at 12.33 hours. Again just a few hours after PW1 had been robbed.
6. In his sworn defence, accused 2 had stated that on 19<sup>th</sup> July 2013 the appellant had left him with the handset belonging to the deceased as security for a friendly loan of Kshs.500, which he increased by Ksh.800 on 1<sup>st</sup> August 2013. He was in possession of the handset on 14<sup>th</sup> August 2013 when he was asked by the Assistant Chief to report to his office where he found a police officer to whom he explained how he had come into possession of the handset. He led the police officers to a place at Shibale where they arrested the appellant.
7. Accused 4’s story, again told under oath, was that he had obtained the stolen item from a lady who had left him with it to secure money. He was arrested by police and charged.
8. It was on the basis of this evidence that the learned trial judge held:

“In this case, the 1<sup>st</sup> Appellant having been found in possession or having used and even sold the phones immediately after the robbery thus the phones of PW1, PW2 and the deceased, the 1st Appellant had a duty to give a reasonable explanation as to how he came by the complainant’s phones and the deceased’s phone. The phones have been identified and confirmed even by service provider and PW4 to belong to the complainants and the deceased. I have at the end of evaluation and analysis of the evidence no doubt that the 1st appellant was in possession and use of complainants and deceased phones and even sold the stolen phones within hours after robbery. It was incumbent upon the 1st Appellant to give



plausible explanation as to how he came to be in possession of the stolen phones which he failed to do. In his defence he did not state anything concerning the fateful date of robbery with violence but opted to talk about his arrest. He did not challenge the evidence relating to his possession and use of the phones of the complainants. I find his defence to be a bare denial and does not dislodge the prosecution testimony.”

9. In the appeal before us, Ms. Imbaya learned counsel appeared for the appellant arguing that while there is no doubt that the handsets of the deceased and PW1 were used after the robbery, the prosecution did not provide proof to the effect that phone number 0716-04xxxx captured in the Safaricom printout belonged to the appellant or that it was the sim card that was in exhibit P. Further, accused 2 did not provide any proof of the alleged purchase of the handset from the appellant. In addition, the person who allegedly introduced him to the appellant was not called as a witness. Regarding the evidence by accused 4, counsel argued that while it was alleged that it was a neighbor who informed him that phone No. 0716 04xxxx belonged to the appellant, the neighbour was not arrested or called to testify. It is also contended that none of the stolen times were found in the possession of the appellant.
10. Connected with this submission, counsel argues that as there was no evidence that the appellant was found in possession of or sold the phones, the first appellate court erred in law in holding that the evidential burden had shifted to the appellant to make a reasonable explanation of how he possessed the phones. The decision of the Supreme Court of Uganda in *Bogere Moses & Anor vs Republic*, Criminal Appeal No. 1 of 1997 was cited.
11. Mr. Okango, learned prosecuting counsel, appeared for the State.  
He argued that there was sufficient evidence that the impugned telephone number belonged to the appellant who did not challenge the issue. Counsel argued that the handsets having been violently stolen a few hours before the appellant used them, it would not be coincidental and the evidential burden of proof then shifted to the appellant who failed to give a satisfactory explanation why he was in possession of the stolen handsets so soon after the robberies.
12. In a second appeal, such as this, our remit is limited to considering and determining issues of law only. (See section 361 of the Criminal Procedure Code). As this Court has previously observed, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere (*Adan Muraguri Mungara v Republic* [2010] eKLR).
13. We think that the concurrent finding by both courts below that telephone number 0716-04xxxx belonged to the appellant is a matter of fact and would not be available for agitation unless it can be demonstrated that the concurrent finding of the two courts was completely against the weight of evidence as to be perverse and one which no tribunal could reasonably reach on the basis of the evidence led.
14. The connection of the telephone number 0716-04xxxx to the appellant is found in the evidence of PW4 who testified:  

“I arrested accused 1 as well and recovered his mobile phone 071604xxxx.”
15. The witness was not cross-examined at all regarding that evidence and while PW4 could have done better in his evidence by elaborating how he came to conclude that the phone he found with the appellant possessed a sim card for number 0716 04xxxx, the evidence that he arrested the appellant and



recovered a telephone from him was not contested at all. This coupled with the fact that the appellant did not, at trial, dispute the evidence that he was the owner of the number, was justification for the courts below to reach a decision that the number belonged to him. We have no reason to disturb that conclusion.

16. As this is the mainstay of the appeal, the appeal cannot possibly succeed. There is evidence that calls from the appellant's number were made from two stolen handsets at different times, so soon after the robberies. There was no attempt whatsoever by the appellant to explain why his sim card would be in the stolen handsets at those times or at all. This evidence was sufficient to found an iron-clad conviction against the appellant even in the absence of the implicating evidence of his co-accused, mindful as

we are that evidence of a co-accused person is evidence of the weakest kind and incapable of supporting a conviction without corroboration since an accused person can implicate another, intending to save himself. (Peter Kinyua Ileri v Republic [2016] eKLR).

17. In the end, this appeal is devoid of merit and we do hereby dismiss it.

**DATED AND DELIVERED AT KISUMU THIS 8<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**

