



**Kemei & another v Republic (Criminal Appeal 117 of 2019)
[2023] KECA 699 (KLR) (16 June 2023) (Judgment)**

Neutral citation: [2023] KECA 699 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CRIMINAL APPEAL 117 OF 2019
F SICHALE, FA OCHIENG & LA ACHODE, JJA
JUNE 16, 2023**

BETWEEN

SYLVESTER KIPTOO KEMEI 1ST APPELLANT

DOUGLAS IMWANA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal against the Judgment of the High Court of Kenya at Eldoret
(S. M. Githinji, J.) dated 22nd November, 2018 in HC.CR.A. No. 34 of 2015)*

JUDGMENT

1. The appellants, Sylvester Kiptoo Kemei and Douglas Imwana were jointly charged together with another person, with three counts of robbery with violence contrary to Section 295 as read with Section 296(2) of the *Penal Code*. Their co-accused was also charged with an alternative count of, handling stolen goods contrary to Section 322(1) as read with Section 322(2) of the *Penal Code*.
2. The appellants denied all the charges, leading to a full trial. The prosecution called a total 12 witnesses. Their testimonies were as follows:
3. According to PW1, on July 4, 2012 she closed her shop at 9 pm and went to her house behind the shop. She lived with PW2 and PW5. At around 12:30 am, she heard noises outside as though someone was cutting the door. She enquired what was going on but no one responded. When she turned on the electricity lights, the assailants came into the living room armed with sticks, a panga, a knife and a torch. They ransacked the house. They said they wanted money. She was pushed off the bed and she fell down. One of the assailants started strangling her.



4. The assailants broke PW2 and PW5's door using a rock. They blindfolded PW2 and PW5 and led them to PW1's room. Their legs and hands were tied using a rope. More assailants entered the room, they were about seven of them. The assailants thereafter left the house and went to the shop. She got from under the bed and followed the assailants, who were surprised that she was still alive. She was then blindfolded and gagged. She heard a car approach. She asked PW1 and PW5 to raise alarm and Veronica, their neighbor, came and opened the door which had been locked from the outside. The assailants had escaped. Many people had gathered outside while others pursued the assailants. She lost many valuables and Kshs 303,110/-. PW2 and PW5 also lost their phones.
5. PW3 operated a taxi, KAK 516K Toyota starlet. On the material day his mother was unwell and admitted in hospital. He went to check on her that morning. In the meantime, he left the taxi and his mobile phone to one, Anthony Kamau Mwaniki so that he could continue with the business.
6. PW4 was called by the assistant Chief Eresca sub-location on July 5, 2012 and informed of a robbery that had taken place. He called the OCS Tambach and reported the incident. He also informed the police at Chepsigot AP Camp. He was informed that motor vehicle KAZ 310X had been seen at Flourspar area. He proceeded there with the OCS, and found the motor vehicle had been set on fire. They then went towards Kerio river where a suspect had been beaten and arrested by members of the public. His name was John Odero; he died. He had given the phone number of his accomplice, Sylvester Koech to members of the public.
7. When he received information of the suspicious man from PW6, the chief together with the assistant chief arrested and interrogated the suspect. The suspect was later identified as Sylvester Kiptoo, the 1st appellant. When he dialed the number they had been given, it rang in the suspect's pocket. He gave them his wallet and they removed two mobile phones, Nokia C-2. Members of the public had now gathered, there was a scuffle and the suspect was injured. He was treated at Iten District hospital and later taken to Iten Police Station. PW8 identified one of the phones as hers, using the screen saver photograph of herself. She had left the phone charging in PW1's house.
8. PW6 was going to Rokocho Centre at 2pm on July 5, 2012 when she met a stranger who asked for directions to the tarmac road. They walked together to the road. The man told her he was from Kapkawa and was going to Chepkoilel. He gave her Kshs 200/-. He asked her to tell anyone who asked, that he was her son. She became suspicious of the man, and on reaching the tarmac road, she sent someone to inform the area Chief.
9. PW9 was at the time attached to Chepsigot Chief's Camp. When he received information of the robbery, he went and placed barriers at the Tot and Iten junction. After about 15 minutes, motor vehicle KAK 516K approached at a high speed. The driver shot in the air and there was fire exchange. The passengers got out and ran into the nearby bushes. They were carrying a bag. One was injured and left a trail of blood. They pursued them with the help of members of the public. Some of the items stolen from the shop were recovered from the motor vehicle. The motor vehicle was then torched by members of the public. A suitcase containing PW1's Kshs 303,110/- was recovered. PW1 went and identified the goods.
10. PW11 took photos of the two torched vehicles and the scene of crime.
11. PW12 was the OCS Tambach police station. He attended the scene involving motor vehicle KAK 516K. He also visited the scene of motor vehicle KAZ 310X where a suspect had been killed by members of the public. The body of the suspect was taken to Iten. He also pursued a suspect at Koron area. He interrogated a young man and a gentleman. One had a bullet wound on the right hand and right side of the chest. He arrested them and conducted a search. The injured person had a red Nokia



- X2 phone. His name was Anthony Kamau. The other one was the 2nd appellant. He had safaricom scratch cards of Kshs 10 and 20. They were taken to Tambach police station.
12. PW13 investigated the case and charged the appellants.
 13. Put on their respective defences, the 1st appellant stated that he was a taxi operator in Eldoret. He was at home on July 4, 2012 when he was called by PW3, who asked him to operate his taxi while he went to visit his sick mother at the hospital. He picked the motor vehicle KAK 516K at around 6:30 pm. He also took PW3's mobile phone to help with the customers. He was called by a customer called Teso who requested to be picked at KVDA. Two men got in the motor vehicle and inquired of PW3's whereabouts. Teso asked him to fuel the vehicle with Kshs 900/-. They proceeded to Flourpar Mining Company. They left him on a feeder and went in. They returned with some luggage and a briefcase. They took the Iten-Kabarnet road. They found the road blocked about 2km away. He stopped, hooted but nothing happened. One of the passengers said it was a trap and told him to drive away. Suddenly, there were gunshots. He was injured. He escaped into a nearby bush as stones were being thrown towards the motor vehicle. He was joined by Teso. He denied the charges.
 14. The 2nd appellant stated that he was a charcoal dealer. On July 5, 2012 at around 6:30 pm he had customers who needed charcoal. He boarded a supa loaf vehicle to Tambach. He went and bought two sacks of charcoal. He was then arrested, questioned and charged. He denied the charges.
 15. There was a 3rd accused who testified that on July 5, 2012 at about 2 pm he was called by a friend. He went and was arrested by the chief and police officer. He was told of an incident at Imbogo. On the way to the Chief's office he was beaten and fell unconscious. He was admitted at the hospital and later charged. He denied the charges.
 16. At the end of the trial, the appellants and their co-accused were all found guilty of the three counts of robbery with violence. They were convicted and sentenced to death on the first count. Sentences in respect to the other counts were held in abeyance.
 17. Aggrieved by the conviction and sentence, the appellant's co-accused appealed and his conviction and sentence were quashed on February 15, 2017. The appellants also appealed against their conviction and sentence.
 18. The learned Judge in his judgment observed that it was not disputed that robbery with violence took place on the night of 4th and July 5, 2012 at Kabokbok market against PW1, PW2 and PW5. The offenders were armed with offensive weapons namely; sticks, a panga, knife and a torch. The offenders were more than one, PW1 mentioned they were seven. They assaulted PW1 and PW5 and used personal violence against PW2. The court held that this amounted to the offence of robbery with violence.
 19. As regards identification, the learned Judge noted that PW1 was able to identify the appellants when she turned the lights on. She was able to identify the 2nd appellant during the attack and she identified the 1st appellant when she saw him beaten up. PW2 was able to identify them in PW1's room where there was light. PW5 identified the appellants in Court. The court noted that the witnesses did not give a detailed account of the role played by each of the appellants during the robbery. The witnesses did not also describe the appellants to anyone or tell the court what they noticed about them which would have made it possible for them to identify them if they saw them again.
 20. The learned Judge further noted that there was no reliable evidence in the first report in the occurrence book that they had indicated that they could identify the appellants, neither was the intensity of the light in PW1's room stated. The court



- observed that the layout of the room was not given, or the items in the room which might have obstructed the light, or the position of the alleged assailants in relation to the said light. The duration of time within which each of the witnesses saw the assailants was also not revealed. The court found the evidence of the three witnesses to be shaky and unreliable. The court found no fault in the trial court's decision to reject the evidence of identification as it was not convinced that the circumstances obtaining during the alleged robberies favoured identification.
21. On whether the doctrine of recent possession applied to the case, the learned Judge observed that the 2nd appellant was arrested while in possession of safaricom cards of Kshs 10 and 20 denominations. He was in the company of the 1st accused person who had sustained gunshot wounds. The court held that the circumstances and the time which had lapsed between the robberies and the arrest, it was clear that the 2nd appellant was involved in the commission of the alleged offence. The possession of the cards was positively proved by PW12. It was also proved by PW1, 2 and 5 that the cards had been robbed from PW1. The cards were recovered hours after the said robberies in circumstances which irresistibly pointed to the guilt of the 2nd appellant. His explanation of owning a kiosk was found not to be convincing.
 22. As regards the 1st appellant, the court noted that his name and phone number had been given by a suspect named, John Odera. He requested for directions from PW6 while PW4 pursued him. the 1st appellant's actions of giving PW6 Kshs 200/- and asking her to pretend that he was her son were found to be suspect. The phone number given was dialed and it rang in his pocket. He had two phones, one his and

the other was later identified by PW8 as hers. The court found that the circumstances under which the 1st appellant was arrested pointed to his guilt. The doctrine of recent possession applied as he was, arrested hours after the robberies had taken place, in possession of a phone taken during a robbery at PW1's shop. He gave no reasonable explanation on how he came to be in possession of the said phone.
 23. The learned Judge upheld the conviction of the appellants on the strength of the foregoing evidence.
 24. As regards sentence, the learned Judge in light of the [Francis Karioko Muruatetu](#) *Œ Another v Republic* [2017] eKLR substituted the death sentence with 20 years' imprisonment for each of the appellants. The sentences were ordered to run from the date of sentence in the lower court.
 25. Dissatisfied with the judgment, the appellants lodged the present appeal. They raised five grounds to wit; that the learned Judge erred in law by: upholding both conviction and sentence of 20 years imprisonment; failing to observe that the investigation was shoddy, and the prosecution case was not proved beyond reasonable doubt; relying on contradictory evidence of the prosecution witnesses which lacked merit to sustain a conviction; failing to observe that the identification of the appellants was poor; and that PW1 testified that she had been attacked by unknown people yet the two courts held that identification was positive, yet no identification parade was conducted.
 26. When the appeal came up for hearing, Ms. Bor, learned counsel appeared for the appellants whereas Mr. Makori, prosecution counsel was present for the respondent. Parties relied on their written submissions.
 27. The appellants' counsel faulted the learned Judge for failing to consider the ingredients of the charge and convicted the appellants on the basis of the doctrine of recent possession. Counsel submitted that the conviction was therefore, based on mere suspicion. Relying on the cases of [Joshua Makau Kitavi v Republic](#) [2019] eKLR and [Johana Ndungu v Republic](#), Criminal Appeal No 116 of 1995 and



- Section 107 of the *Evidence Act*, counsel submitted that it was apparent the prosecution came up with allegations against the appellants, which they failed to prove.
28. Counsel further submitted that there were inconsistencies in the witness testimonies but failed to expound how.
 29. On sentencing, counsel faulted the learned Judge for only taking into account one mitigation factor and failing to follow the *Sentencing Policy Guidelines* as laid down in the cases of *Nicholas Mukila Ndetei v Republic* [2019] eKLR and *Muruatetu* (supra).
 30. Opposing the appeal, counsel outlined the elements of the offence of robbery with violence as cited in the case of *Oluoch v Republic* [1985] KLR and what needs to be proved for the prosecution to succeed. (See: *Dima Denge Dima v Republic*, Criminal Appeal No 300 of 2007). Counsel further submitted that the prosecution had proved beyond reasonable doubt that; the appellants were armed with dangerous and offensive weapons; they were in the company of one or more persons; and at or immediately before or after the time of the robbery, the appellants wounded, beat and used personal violence on the victims.
 31. Counsel submitted that there was sufficient light in the house, enabling the witnesses identify the appellants. They were able to identify them using electricity light, which favoured a positive identification.
 32. As regards the doctrine of recent possession, counsel submitted that the goods stolen from the house and the shop were recovered from the appellants. They were arrested a few hours after the robbery had taken place. Counsel maintained that it is trite that the doctrine of recent possession entitles the court to draw an inference of guilt, where an accused is found in possession of recently stolen property, in unexplained circumstances. (See: *Eric Otieno Arum v Republic* [2006] eKLR).
 33. Counsel urged that this Court not to interfere with the finding on sentence by the High court as the court took into consideration the new development in *Francis Muruatetu* (supra).
 34. We have carefully considered the record of appeal, submissions by counsel, authorities cited and the law. The main issues for our determination are whether the appellants were properly identified; the doctrine of recent possession was proved; and whether the case against the appellants was proved beyond reasonable doubt.
 35. This being a second appeal, we are legally constrained to consider only issues of law raised in the appeal and not to consider matters of fact tried by the trial court and the appellate court on the first appeal. This is by dint of Section 361(1) (a) of the *Criminal Procedure Code*. This position was reiterated in the case of *M'Riungu v Republic* [1983] KLR 455 where the court stated thus:

“Where the right of appeal is confined to the question of law, an appellate court has loyalty to accept the findings of fact of the lower courts and resist the temptation to treat findings of fact as holdings of fact and law and it should not interfere with the decision of the trial court or the 1st appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision was bad in law.”
 36. It is common ground that the appellants were unknown to the witnesses prior to the time when the offence was committed. It is also not in dispute that other than the electricity light, no effort was made by the prosecution witnesses to describe the assailants. The learned Judge observed that there was no reliable evidence in the first report in the occurrence book that the witnesses had indicated,



their ability to identify the appellants. The learned Judge, who had the opportunity to re-evaluate the evidence of the trial court found the evidence of the three prosecution eye witnesses to be shaky and unreliable. In the case of *R v Turnbull* [1976] 3 All ER 551, Lord Widgery CJ observed that, the quality of identification evidence is critical; if the quality is good and remains good at the close of the defence case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger.

37. In the present appeal, the source of light was electricity light. PW1 turned on the light and was immediately attacked. PW2 and PW5 were blindfolded when they were brought to PW1's room where there was light. The time the appellants spent with

the witnesses was not stated. This in our view were not sufficient circumstances for the witnesses to identify the appellants.

38. With regard to the doctrine of recent possession, the 1st appellant was found with a stolen Nokia X2 phone in his pocket which was later identified to be the property of PW8. He was arrested a few hours after the robbery had been reported. The 2nd appellant was also arrested a few hours after the robbery with safaricom scratch cards stolen from PW1's shop. The items were positively identified by PW1, PW3 and PW8 as belonging to them. The complainants identified the items after the same were recovered from the appellants, upon their arrest. The appellants did not sufficiently explain how they came into contact with the said items. It follows that, any reasonable man would draw an inference of guilt based on the appellants' physical and actual possession of some of the stolen items as recovered from their person so immediately after the fact. The doctrine of recent possession in the Canadian case of *Republic v Kowkyk* [1988] 2 SCR 59 was held by the majority of the Supreme Court as follows:

“Upon proof of the unexplained possession of recently stolen property, the trier of fact may –but not must- draw an inference of guilt of theft or of offences incidental thereto. Where the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be for the trier of fact upon a consideration of all the circumstances to decide which, if either, inference should be drawn. In all recent possession cases the inference of guilt is permissive, not mandatory, and when an explanation is offered which might reasonably be true, even though the trier of fact is not satisfied of its truth, the doctrine will not apply.”

39. The elements of the doctrine of recent possession were laid out in the case of *Isaac Ng'ang'a alias Peter Ng'ang'a Kabiga v Republic*, Cr App. No 272 of 2005 (UR) where this court held thus:

“It is trite that before a court of law can rely on the Doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof;

- i. that the property was found with the suspect;
- ii. that the property is positively the property of the complainant;
- iii. that the property was stolen from the complainant;
- iv. 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.”



40. From the foregoing, we are satisfied that all the aforesaid elements of the doctrine of recent possession were proved in this case. We therefore find no reason to interfere with the finding of the two courts below, regarding how the doctrine of recent possession applied to this case.
41. On whether the prosecution case was proved beyond reasonable doubt, Section 296(2) of the penal Code and the case of *Oluoch v Republic* (supra) outlined the three ingredients which need to be proven in order to sustain a conviction for an offence of robbery with violence. The prosecution need only prove one. The elements are:
- “The offender is armed with any dangerous or offensive weapon or instrument; the offender is in the company of one or more person or persons; or at or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person.”
42. It was not disputed that the assailants were armed with sticks, a panga and a knife. It is evident from the record that; the appellants were in the company of other people, besides themselves. It is also evident from the testimony of PW1 that she was struck before she fell under the bed. PW2 and PW5 were blindfolded and tied with ropes which amounts to personal violence.
43. From the foregoing, we are satisfied that the prosecution case against the appellants was overwhelmingly credible. We find no reasons to warrant interference with the concurrent findings of the two courts below, on conviction.
44. With regard to the sentence, the Supreme Court in the case of *Francis Muruatetu*, (supra) held:
- “Consequently, we find that Section 204 of the penal code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder.”
45. Section 204 of the Penal Code provides that; “Any person convicted for murder shall be sentenced to death.” Similarly, Section 296(2) of the Penal Code provides that the offender convicted for robbery with violence in circumstances stipulated therein; “shall be sentenced to death.”
46. In the case of *William Okungu Kittiny v Republic*, Criminal Appeal No 56 of 2013, this court held that:
- “From the foregoing, we hold that the findings and holding of the Supreme Court, particularly in para. 69, applies Mutatis Mutandis to section 296 (2) and 297 (2) of the penal code. Thus, the sentence of death under section 296 (2) and 297(2) of the penal code is a discretionary maximum punishment.”
47. It follows therefore, that the learned Judge having considered the decision of the Supreme Court in *Francis Muruatetu* (supra) and reduced the sentence to 20 years’ imprisonment, we have no reason to interfere with the said finding.
48. For the foregoing reasons, we find no merit in the appeal before us. The appeal is dismissed.
- Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 16TH DAY OF JUNE, 2023.

F. SICHALE



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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

