



REPUBLIC OF KENYA



KENYA LAW
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**Sakwa v Republic (Criminal Appeal 159 of 2017)
[2023] KECA 732 (KLR) (9 June 2023) (Judgment)**

Neutral citation: [2023] KECA 732 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 159 OF 2017
PO KIAGE, F TUIYOT'T & WK KORIR, JJA
JUNE 9, 2023**

BETWEEN

MOHAMMED SHIUNDU SAKWA APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal against the Judgment of the High Court of Kenya at Kakamega (R.N. Sitati, J.) delivered and dated 9th March 2017 in HC CR Appeal No. 102 of 2013)

JUDGMENT

1. Mohammed Sunduli Sakwa, the appellant herein, is before us on a second appeal. He was charged and convicted for robbery with violence contrary to section 296(2) of the *Penal Code* and sentenced to suffer death. The charge was premised on the particulars that on October 3, 2011, at Khabakaya Village in Wanga Location, Mumias District within Kakamega County, he jointly with others not before court while armed with pangas, rungas and iron bars, robbed Patrick Were Makokha of one mobile phone, national identity card, voter's card, a Shianda Motorbike Youth Group membership card and cash all valued at Kshs. 5,000. The appellant also faced a second count of assault causing actual bodily harm contrary to section 251 of the *Penal Code*. The particulars were that on October 30, 2011 within the same locality as in the first count, he assaulted Edwin Musoli Echesa thereby occasioning him actual bodily harm.
2. In a nutshell, the case against the appellant was that on October 3, 2011 at night he robbed Patrick Were Makokha (PW1) who was on his way home after concluding his daily errands as a motorbike rider. It was said that the appellant was in the company of others and they were armed with crude weapons. They thereafter assaulted PW1 leaving him unconscious. PW1 regained consciousness the following morning and realized that he had been robbed and his items as particularized in the charge taken away. PW1 did not recognize any of his assailants at the scene.



3. Fast forward to October 30, 2011, when the appellant was arrested at the home of Edwin Musoli Echesa (PW2) where he had invaded the home and assaulted PW2. With the help of members of the public, the appellant was arrested and detained at the home until the following morning. He was then escorted to the nearby AP Camp by PW2 and Fredrick John Sakulu (PW3), a village elder. Upon being frisked, PW1's national identification card, voter's card and a membership card for Shianda Motorbike Youth Group were recovered from him. PW1 was called to the AP Camp where he identified his documents. The appellant was escorted to Mumias Police Station where he was rearrested by PC Jackson Langat and later charged.
4. In his defence, the appellant stated that on October 30, 2011, he was accosted by PW2 and PW3 while he was heading to his farm to apply fertilizer to his maize. The duo accused him of having stolen the fertilizer he was carrying. PW2 and PW3 then took him to the home of PW2 prior to escorting him to the police station. He also distanced himself from ever being in possession of PW1's items which were presented before the trial court as exhibits.
5. Upon conviction and sentencing by the trial court, the appellant challenged the trial court's decision in the High Court where his appeal was dismissed on March 9, 2018 in its entirety thereby prompting him to file the present appeal. As per the memorandum of appeal, the appeal is premised on the grounds that the appellant was not accorded a fair hearing; that his right to free legal representation was violated; that the charge was incurably defective; that all the ingredients of the offence were not proved; that he was not properly identified; that the principle of recent possession was wrongly applied; and that the death sentence should be reviewed in light of the Supreme Court decision in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR.
6. When the appeal came up for hearing on February 15, 2023, Mr. Mshindi and Mr. Okango appeared for the appellant and respondent respectively. While Mr. Mshindi had filed written submissions, Mr. Okango was yet to file written submissions and he chose to submit orally in Court. Prior to the hearing of the appeal, counsel for the appellant informed us that they were abandoning all the grounds of appeal save for the grounds that all the elements of the offence were not proved and that the two courts below wrongly applied the doctrine of recent possession. We respect the appellant's decision and restrict ourselves to those two grounds of appeal.
7. Mr. Mshindi for the appellant commenced the submissions by pointing out that the elements of the offence of robbery with violence as set out in section 296(2) of the *Penal Code* and reiterated in *Charles Maina Wamai v Republic* [2003] KLR 279. According to counsel, the offence can only be established if it is shown that during the theft, an accused person was armed with a dangerous or offensive weapon or instrument; or was in the company of one or more persons; or at or immediately before or immediately after the time of the incident assaults the victim. Counsel submitted that the allegation that force was used during the robbery, could only be established through production of medical records. Counsel pointed out that although the complainant's P3 form was marked for identification before the trial court, it was never produced as an exhibit. Counsel reiterated that the failure to produce the P3 form was fatal to the case since without the P3 form, the court could not ascertain the type of weapon used and the nature of injuries inflicted on the complainant; and that without it, the element of violence was not proved.
8. In respect to the claim that the courts below misapplied the doctrine of recent possession, counsel relied on *Erick Otieno Arum v Republic* [2006] eKLR and submitted that for a conviction to arise based on the doctrine of recent possession, the prosecution has to establish that the property was found with the accused person; that the property is positively identified as the property of the complainant; and, that the property was recently stolen from the complainant. Counsel submitted that the evidence



on record was inconclusive as to how the exhibits were recovered from the appellant; and that a long period of time had lapsed between the date of robbery and the date of the recovery thereby leaving a possibility that the documents could have changed hands. Counsel was therefore of the view that in the circumstances, the doctrine of recent possession was inapplicable. In conclusion, counsel urged that we allow the appeal, quash the conviction and set aside the sentence.

9. In rebuttal, Mr. Okango submitted that proof of any of the three ingredients of the offence of robbery with violence is sufficient to sustain a conviction for the offence. According to counsel, the prosecution proved that the appellant who was armed with a crude weapon was in the company of other persons and inflicted injuries on the complainant at the time of the robbery. Counsel further submitted that the doctrine of recent possession was properly applied and that the appellant did not explain how he came into possession of the items stolen from PW1. Mr. Okango consequently asked us to dismiss the appeal.
10. This is a second appeal and as per the provisions of section 361(1) & (2) of the [Criminal Procedure Code](#) our mandate is limited to issues of law. Facts must remain, as much as possible, as already concurrently established by the two courts below. The exception is where the conclusion of fact is not based on the evidence on record or was erroneously arrived at as a result of the misapprehension of the law. On this point, we only need to refer to [Adan Muraguri Mungara v Republic](#) [2010] eKLR where it was stated that:

“Adan is now before us on his second and final appeal which may only be urged on issues of law (section 361 [Criminal Procedure Code](#)). As this Court has stated many times before, 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.”

11. We have duly reviewed and considered the record of appeal and the submissions by counsel on both sides. The two issues arising for our determination are whether the doctrine of recent possession was applicable in this matter; and whether the offence of robbery with violence was proved against the appellant. We will consider these two issues concurrently.
12. The appellant was charged for violating section 296(2) of the [Penal Code](#) which provides as follows:

“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.”

13. From the foregoing provision, for an offence of robbery with violence to subsist, an accused person ought to either be armed with a dangerous weapon or instrument; or be in the company of another or others; or deploy actual violence against the victim during, or immediately before, or immediately after the robbery. Discussing the provision in [Dima Denge Dima & others v Republic](#) [2013] eKLR, the Court concluded that:

“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.”



14. We agree with the pronouncement hereinabove that for one to be convicted for the offence of robbery with violence the prosecution is required to prove that the offender was armed with a dangerous or offensive weapon or instrument; or was in company of another or others; or at or immediately before or immediately after the time of the robbery he injured or used violence on somebody. The question therefore is whether either of the elements were established. From the record, the evidence of PW1 was to the effect that he was robbed by a group of people wielding crude weapons. Further, that he was hit on the ear, throat and hand and he lost consciousness. Violence was therefore used on him. When he came to the next morning, his personal items were missing. This confirms that theft was also committed in the process. The evidence was never controverted and it remains a concurrent finding of fact by the two courts below which courts are mandated to assess the factual evidence. From the definition of the offence of robbery with violence in section 295 of the *Penal Code* one can deduce that the offence of robbery with violence is theft by force. In the instant case, in order to achieve the objective of stealing, the appellant while armed surrounded himself with other persons and used violence prior to stealing from the complainant. The prosecution therefore discharged its onus by proving all the three elements of the offence of robbery with violence. The prosecution was only required to prove one of those elements as they are disjunctive. It is immaterial that the complainant's P3 form was not produced considering that for the prosecution to prove the element of violence it is sufficient to adduce evidence that a person was wounded, beaten or struck during the robbery. PW1's testimony confirmed that he was injured during the robbery.
15. Having established that the offence of robbery with violence was committed against PW1, the question that remains is whether the appellant was linked to this offence. PW1 was clear that he was not able to identify any of the attackers during the incident. Both the trial court and the first appellate court relied on the fact that the stolen items were recovered from the appellant during his arrest to link him to the offence. The doctrine of recent possession was therefore used to convict the appellant. The first appellate court appreciated the elements of the doctrine of recent possession by referring to the case of *Rubi v Republic* [1985] KLR 373.
16. The Canadian Supreme Court in *Republic v Kowkyk* (1988) 2 SCR 59, as cited by this Court in *David Mugo Kimunge v Republic* [2015] eKLR, explained the doctrine of recent possession 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.”
17. The Court in *David Mugo Kimunge* (supra) then went ahead to state the Kenyan position on the doctrine as follows:
- “There is no significant disparity between the English/Canadian position and what has been accepted as the applicable doctrine in our courts. Applying that learning to the case before us, we are of the view that the inference arising from the unexplained possession of stolen goods is one of fact. The trier of fact in this case was the Principal Magistrate's court which had the advantage of seeing and hearing the witnesses testify before it. As always, the first appellate and the second appellate courts must of necessity give allowance for this advantage



and be slow to interfere unless there was no evidence to support the findings or the findings were perverse. It is also clear from the decisions that the truth of the explanation alluded to in the doctrine is not the standard applicable. Nor is it acceptable that any fanciful or concocted explanation will suffice. The explanation must pass the muster of reasonableness and plausibility.”

18. 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.
19. Applying the test to the present case, we find that the trial court and the first appellate court were convinced that the appellant was found in possession of the documents belonging to the complainant and which had been reported as stolen during robbery. These were items personal to the complainant and of no monetary value so that it cannot be said that they changed hands for money. The next step of inquiry is whether the appellant put forth a reasonable explanation as to how he came into possession of the stolen items and whether the two courts below considered that explanation prior to invoking the doctrine of recent possession. From the record, the appellant alleged that the items were planted on him following his arrest after they were brought to the police station by PW1. Both the trial court and the High Court considered the appellant’s explanation and held that it was not reasonable in light of the evidence of PW2, PW3 and PW4 who all testified that it was out of PW4’s routine search after the appellant’s arrest that PW1’s documents were recovered.
20. Before we conclude on this issue, it is important to address the argument by the appellant’s counsel that the time difference between the robbery and the recovery was long as to leave the possibility that the appellant could have received the items from a third party. This argument was raised before the first appellate court and rejected. In our view, there is no evidence on record that could lead to a different conclusion. The appellant’s mere denial did not oust the cogent evidence of the prosecution witnesses that the items were recovered from him. It was upon the appellant to explain how those items found themselves in his person. He did not do so.
21. Having said the foregoing, we arrive at the inevitable conclusion that the two courts did not err in their appreciation and application of the doctrine of recent possession. They cannot be faulted. The appellant was accordingly linked to the offence. We are also convinced, and we find that the offence of robbery with violence was proved against the appellant. The appeal against conviction is therefore found to be without merit and is hereby dismissed.
22. With respect to ground 8 of the memorandum of appeal, we find it prudent to point out that under section 361 of the *Criminal Procedure Code*, severity of sentence is regarded as a factual matter which does not fall within our remit. An appellant seeking to have this Court’s audience on matters sentence need to establish either that the sentence was enhanced by the High Court, or that the subordinate court had no power to pass that sentence. It is not in dispute that the High Court did not enhance the appellant’s sentence. It is also not disputed that under section 7 of the *Criminal Procedure Code* the trial court had the legal mandate to pass the sentence under section 296(2) of the *Penal Code*. In the



circumstances, we find that the appeal against sentence is not one within our purview. We therefore decline the invitation to indulge it.

23. Our analysis above leads to the inevitable conclusion that this appeal is without merit and is for dismissal in its entirety. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 9TH DAY OF JUNE, 2023.

P. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

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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.

DEPUTY REGISTRAR

