



REPUBLIC OF KENYA



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**Wafula v Republic (Criminal Appeal E123 of 2022)
[2023] KECA 1408 (KLR) (24 November 2023) (Judgment)**

Neutral citation: [2023] KECA 1408 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL E123 OF 2022
PO KIAGE, M NGUGI & JM NGUGI, JJA
NOVEMBER 24, 2023**

BETWEEN

JAMES BARASA WAFULA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence of the High Court of Kenya at Bungoma (S. M. Riechi J.) dated 11th November 2021 in Criminal Case No. 23 of 2018)

JUDGMENT

1. The appellant, James Barasa Wafula, no doubt learnt a salutary lesson from the events of July 2018. His acceptance from ‘someone’ of a phone, Samsung IMEI No. 359927/07/097873/0 in doubtful circumstances-with the request to ‘flush’ and later to sell the said phone- landed him before the High Court in Bungoma facing a charge of murder, and ultimately in prison, where he faces a 20-year jail term. This is what has brought him before this Court on appeal.
2. The appellant and his co-accused, Wilberforce Fuchaka Simiyu (accused 1), Dauglas Simiyu Kinali (accused 2), John Barasa Manyonge (accused 3), David Wafula Wakhungu (accused 4), Tom Wataka Muindi (accused 5) were charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence are that on the 3rd day of July 2018 at Binyenya village, Kakamwe Sub-location Bungoma North Sub-county within Bungoma County, they murdered Paul Kerich. The appellant was accused no 6 before the trial court.
3. While the appellant’s co-accused were found not guilty of the offence and acquitted, the appellant was found guilty, convicted, and sentenced to twenty years’ imprisonment in the judgment of the court dated 11th November 2021.



4. The appellant was dissatisfied with both his conviction and sentence and has filed the present appeal in which he raises five grounds of appeal in his memorandum of appeal dated 2nd May, 2022. He contends in these grounds that the trial judge erred in law and fact:
 - i. when he relied on the doctrine of recent possession to convict the appellant with the offence of murder when the ingredients of the doctrine had not been proved;
 - ii. in failing to acknowledge and appreciate the glaring contradictions in the prosecution case which definitely created reasonable doubts in its case;
 - iii. in failing to appreciate that the prosecution had failed to establish their case beyond reasonable doubt;
 - iv. when he failed to take into consideration the appellant's evidence on record;
 - v. in completely failing to consider the appellant's mitigation on record and thereby passing a sentence which was manifestly harsh bearing in mind the circumstances of the case and the Appellant's previous record.
5. As this is a first appeal, this Court is under a duty to re-evaluate the prosecution evidence and reach its own conclusions, making due allowance for the fact that it has neither seen nor heard the witnesses-see *Okeno v Republic* [1972] EA 32.
6. The prosecution case was presented through 16 witnesses. Stephen Simiyu Abesi (PW1, Stephen), the Chairman of Ambogi Boda boda Self-Help Group which has forty-five members was on duty at the stage on 3rd July 2018 at 10 a.m. when he received information that some boda boda riders had dug a trench along Ambogi-Ndalu road. He informed the Assistant-Chief (PW2) whom he carried on his motor cycle to the scene. At the scene he found a trench had been dug. He informed the boda boda riders at the scene that the Assistant Chief would address them and went to look for the member of County Assembly (MCA). He did not find the MCA so he went back to the scene and left with the Assistant Chief. Later that day, at 5 p.m. he was informed that a person had been shot. He decided to go back to the scene but on the way, he met Robert Nakitare who had also been shot.
7. Jane Naliaka Mwanja (PW2) was the Assistant Chief of Kakambi sub-location. She was informed that boda boda riders were demonstrating about the state of the road, and she went with Stephen to the scene where the riders told her they wanted to speak to 'the people concerned' and not her. When she contacted the Assistant County Commissioner, he told her to call an MCA, who promised to send an assistant. PW2 left the scene and went to other duties. Later, she received information that one George had been shot and that the deceased had been killed. She did not witness either of them being killed.
8. Joyce Kavou Mwonga (PW4, Joyce), the wife of the deceased, was at the police lines at Kapchorwa Police Station when the deceased left for duty in the afternoon. Later she received information that he had been killed. His body was taken to the mortuary on the same day.
9. On 13th July 2018, Joyce was asked for the IMEI number of the deceased's mobile phone. She checked in the box he had bought the mobile phone in and found the IMEI No. 359927/07/097873/0. On 7th August 2018, she was asked to forward the box and the receipt the deceased was issued with when he bought the phone on 6th July 2016, which she did. She identified the mobile phone in court as belonging to the deceased.
10. Chief Inspector Julius Omboto (PW6), then OCS Kiminini Police Station testified that on 3rd July 2018 he went to the sub-county headquarters and left the deceased in charge at the station. While at the sub county headquarters, he received a telephone call from the deceased who informed him that



some youths had dug a trench at the Mukuyuni road and that he had gone to the scene. He instructed inspector Maritim (PW7) to go to the scene. Later inspector Maritim called him and informed him that the deceased had been killed.

11. Inspector Philip Kipyegon Maritim (PW7) was called by PW6 who informed him of the digging of the trench along the road. Shortly thereafter, he received a call from the deceased who informed him that people were stoning him. PW7 went to the police station to get reinforcement and started off for the scene but on the way, he received information that the deceased had been killed. When he reached the scene, he found the body of the deceased, which was taken to the mortuary. PW7 testified that at the scene, he saw a crowd but it was far and he could not identify the people in it.
12. APC Patrick Okwako (PW8) was with Maritim (PW7) when they went to the scene and found the body of the boda boda rider who had been shot. They were also shown where the body of the deceased lay, with a pistol next to him. PW8 took the pistol, and with other officers, took the body of the deceased to the police station. Later, he returned to the scene and with other officers, arrested about 18 people.
13. PW8 testified that the appellant was arrested at Ndaluni market with a mobile phone, and he was taken to Mukuyuni Police Station. In cross-examination, he maintained that the appellant was found with the phone, and was arrested in his house at night. He further stated in cross-examination that there were more than 1000 people at the scene, so he could not have recognised the appellant.
14. Antony Nakitare (PW9, Nakitare) testified that on 3rd July 2018 at 4.30 p.m. he was at Amish (variously indicated in the record of the trial court as Amish or Amisi or Ambich). He went to the stage where he met George, a boda boda rider, and they rode on the motor cycle towards the bridge. At the bridge, they decided to push the motor cycle. He then saw George argue with a person, telling the person 'unaninyanyasa'. Nakitare then heard a gunshot, and he was shot on the shoulder. He became unconscious. It was his testimony that he did not see the accused persons at the scene.
15. The testimony of PW10, Frank Matere Aboss, was that he was carrying sisal on a boda boda when he reached the bridge and found a trench had been dug across the road. He borrowed a jembe to fill it and pass. He then saw many boda boda riders come, and they beat him up. He identified his attackers as one Kevin and Edwin -both of whom were not among the persons accused of the murder of the deceased- who also took away Kshs 2000 from him. He stated in cross-examination that he was not present when George and the deceased were killed.
16. In his testimony, PW11, George Omenya Chesimba, who described himself as the Chairman of Ndaluni boda boda riders, stated that he only visited the scene after the event where he saw both George and the deceased's bodies lying at the scene.
17. The testimony of PW12, John Wamalwa Simiyu, was that he was at his home when he saw young boys demonstrating about the poor state of the road between Ndaluni and Amisi. They had dug trenches on the road. He testified that he was about 20 meters away when he saw George Simiyu and another person who wore a khaki attire struggling over ignition key of a motor cycle. He then saw the person in khaki, whom he came to know was the deceased, remove a pistol. It was his testimony that there was a quarrel between George and the deceased police officer, and he saw many people come from Ndaluni Brigadier and Tongaren to the scene. He saw the police officer shoot at George and the son of Nakitare, then start running away, and he heard more gun shots. PW12 did not identify the people who were chasing the police officer, but he later heard that the officer had been killed.
18. The evidence of PW13, Peter Simiyu Wanamboko, was that he works at a cyber-café. In July 2018, the appellant, who also worked in an adjacent cyber-café, took a Samsung phone and requested him to flush it. The phone had been done factory reset and required one to input an IMEI number. He



- testified that he managed to flush it by bypassing the IMEI number input. It was his testimony that the appellant paid him Kshs. 200. PW13 testified that the police later arrested him and he confirmed that he was the one who had flushed the phone.
19. Emmanuel Simiyu Lumbasi (PW14, Lumbasi) was at his butchery on 25th July 2018 when the appellant went to him and told him that he had a mobile phone he wanted to sell at Kshs. 3000. Lumbasi agreed to buy it at Kshs 2500. Lumbasi gave the appellant his KCB card and PIN number and the appellant withdrew the money, after which the appellant gave Lumbasi the phone. Lumbasi testified that he was later arrested by police with the phone and he informed the police that he had bought it from the appellant.
 20. The investigating officer, PC Fredrick Omondi (PW15) was assigned to investigate the murder of the deceased. He testified that the deceased had been issued with a pistol and 15 rounds of ammunition. It was his testimony that there was an incident of unrest at Amish and the deceased went there alone. PC Omondi testified that he established that while at the scene, one young man attempted to stab the deceased with a knife, and the deceased shot him. Boda boda riders then chased the deceased and he used 10 rounds of ammunition, then the boda boda riders stoned him. PW15 established that the deceased had a phone while at the scene, and they obtained the phone's IMEI number, 3599270978730.
 21. Using the number, they traced the phone to Emmanuel Simiyu Lumbasi (PW14) who, upon interrogation, said he bought it from the appellant. When arrested and interrogated, the appellant said he was given the phone by his co-accused, John Barasa Manyonge (accused no 3). PW15 testified that upon searching the appellant's possessions, they recovered the sim card and ID No. used to register the new sim card.
 22. PW15 stated that the deceased was killed by boda boda riders who hit him with stones. That the police had arrested the appellant whom they found with the deceased's phone, and he said he was given the phone by accused 3.
 23. PW15 further testified that they had written to Safaricom for call data on the deceased's phone. They received information that it was being used by the appellant. It was his testimony that no- one saw the deceased being killed; that there were 20 people at the scene, and that he arrested the accused at the scene where he recovered the phone.
 24. The post mortem report on the deceased was produced by PW16 Dr, Mwanikha Fred. He testified that the deceased had multiple bruises on head, neck, and abdomen; had an open skull fracture, a fractured upper jaw, and loss of brain which was outside the skull. He stated that the cause of death was head and spinal injury secondary to mob (in)justice.
 25. When placed on their defence, the appellant and his co-accused gave varying defences, the essence of which was denial of involvement in the death of the deceased.
 26. In his defence, the appellant testified that he works at a cyber café. On 3rd July 2018, he was at his place of work from morning till evening. On 17th July 2018, a customer brought a phone, Samsung by make, for him to remove a password. The customer left the phone, and the appellant took it to Peter (PW13) who flushed it for him. He collected it from Peter the following day. The appellant testified that he called the owner to come for it but he did not come, and he later told the appellant to sell the phone and send him the money. The appellant testified that he sold the phone to Lumbasi at Kshs 2500, took his commission of Kshs 500 and sent the money to the number the customer had given him, which showed the recipient as Rosemary Nakhumicha.
 27. The police later went to him and inquired about the phone, and he took them to Lumbasi. He gave the police the name of Rosemary Nakhumicha and the M-pesa message, and he took them to PW14 who



gave them the phone. He testified that the police did not arrest Rosemary or follow up on the mobile phone number. PW14 was arrested and released 'after paying money.'

28. In cross-examination, he stated that it was true that he took the phone to PW13 to flush for him; that he sold the phone to PW14; that he sent the money paid by M-pesa; that he did not look for his M-pesa statement to produce in evidence as the police had his phone, and he had kept the phone for one and a half weeks before he sold it to Lumbasi.
29. Upon considering the evidence before him, the trial judge found that none of the witnesses testified to having seen any of the accused persons chase and inflict injuries on the deceased. Regarding the appellant, the trial court found that the evidence connecting him to the offence was that he was found in possession of the deceased's mobile phone which the deceased had at the time he was killed. The appellant was found to have sold the phone to Lumbasi on 25th July 2018; that Peter had confirmed that the appellant had taken the phone to him to flush and bypass the input of a password.
30. The trial court further found that the prosecution of the appellant relied on the doctrine of recent possession of an article possessed by the deceased at the time of the killing and found in the possession of the appellant. The appellant had readily admitted that he was in possession of the mobile phone on 17th July 2018, his explanation being that he was given the phone by a person he did not know, first to flush and later to sell.
31. The trial court reasoned that the explanation by the possessor must be to such standard as to satisfy the court that the possessor was lawfully possessed of the item. In this case, the appellant, in the trial court's view, neither stated the name of the person who allegedly gave him the phone, the alleged phone number he left nor the message he allegedly received. Accordingly, pursuant to the doctrine of recent possession, the court drew the inference that the appellant obtained the mobile phone from the deceased at the time of the murder.
32. In his written submissions in support of his appeal dated 11th May, 2023, the appellant, through his learned counsel, Mr. Wangonda, contends that the learned judge erred in relying on the doctrine of recent possession to convict him of the offence of murder, yet the ingredients of the doctrine of recent possession had not been proved. The appellant cited in support the case of *Isaac Ng'ang'a Kabiga & another v Republic* (2006) eKLR. It is his submission that the presumption of recent possession requires the prosecution to prove all the necessary elements, including how the accused came into possession of the property in question.
33. His case is that the prosecution failed to prove that the appellant was found in possession of the deceased's Samsung phone when he was arrested. It is submitted that according to PW8's testimony, the appellant was arrested on the day of the murder along with 18 other individuals, and a Samsung phone was allegedly found in his possession. The prosecution had failed to prove that the appellant was found in possession of the phone immediately after the murder of the deceased, and the prosecution evidence did not meet the requirements of the doctrine.
34. The appellant submits further that the prosecution failed to establish its case beyond reasonable doubt. There was no direct evidence to connect the appellant to the death of the deceased as the prosecution failed to establish that the death of the deceased was a direct consequence of an unlawful act or omission on the part of the appellant. He submits further that PW15 had testified that it is the boda boda riders who attacked the deceased by hitting him with stones, none of the witnesses mentioned the appellant, and the appellant was not a boda boda rider.
35. The appellant further submits that there was contradiction between the evidence of PW8 and PW15 about when and where the appellant was arrested with the phone belonging to the deceased. It is the



- appellant's submission that these were material contradictions which cast reasonable doubt on the prosecution case.
36. With respect to his second ground of appeal, the appellant submits that both malice aforethought and mens rea were not proved as none of the prosecution witnesses placed the appellant at the scene of crime. The appellant submits that PW16 testified that the cause of death of the deceased was due to severe head and spine injury secondary to mob justice, while PW15 testified that the deceased was attacked by boda boda riders who stoned him to death.
 37. With regard to his third ground of appeal, the appellant submits that his defence on record was not considered. His evidence regarding receiving and selling the Samsung phone, as well as the failure of the prosecution to challenge this evidence, should have been considered by the judge.
 38. Regarding sentence, his fourth ground of appeal, the appellant submits that his mitigation was not considered before sentencing, thereby passing a sentence which was manifestly harsh and excessive in the circumstances. He submits that in light of the Supreme Court decision in *Francis Karioko Mitruatetu another v Republic & 4 others* [2015] eKLR, the matter should be remitted to the High Court for re-sentencing.
 39. Not having filed submissions in support of the respondent's position on the appeal, learned Senior Prosecution Counsel, Mr. Okango, sought and obtained the leave of the Court to make oral submissions on behalf of the respondent. The respondent opposed the appeal on both conviction and sentence.
 40. With respect to the appellant's first ground of appeal pertaining to recent possession, Mr. Okango submitted that the doctrine was well invoked and applied in this matter. It was his submission that it is true that the deceased was killed by a mob; that he succumbed to injuries inflicted upon him by a mob when he was accused of having shot one George. He further submitted that nobody was arrested at the scene of the incident as having actually been part of the people who assaulted and killed the deceased.
 41. It was his submission, however, that the prosecution had obtained evidence in the course of the investigation that the Samsung mobile phone that belonged to the deceased was traced to some individuals. It was traced, first, to PW14. According to Mr. Okango, under the principles pertaining to the doctrine of recent possession as enunciated in the case of *Isaac Nganga Kabiga v R (supra)*, the phone having been established and proved to belong to the deceased, when it was traced to PW14, failure by PW14 to explain satisfactorily how he got into possession of the phone would have led to his being the person charged with the murder of the deceased.
 42. Mr. Okango's submission, however, was that PW14 gave reasons and explained how he came to be in possession of the phone, his explanation being that the phone was sold to him by the appellant. The appellant, according to Mr. Okango, did not deny that he sold the phone to PW14 when the investigator went to him, so PW14 was dropped (as a suspect). The explanation that the appellant gave on how he came to be in possession of the phone, according to the respondent, is what the High Court rightfully held was not satisfactory. The appellant had said that he was given the phone by a customer who wanted him to sell it on his behalf. The appellant did not, however, give the name of this customer. Instead, according to Mr. Okango, the appellant said in his evidence that he sold the phone and transferred money to that customer. He did not give the telephone number of the customer.
 43. Mr. Okango submitted therefore that the appellant did not discharge his obligation or his duty once the prosecution had tendered evidence that enabled the court to invoke the doctrine of recent possession.
 44. Mr. Okango dismissed the appellant's contention in his second ground of appeal that there were contradictions in the prosecution evidence that should have been resolved in his favour. Mr. Okango



- noted that counsel for the appellant had submitted that, as alleged in the appellant's second ground of appeal, there were contradiction in the evidence. He noted that it had been submitted for the appellant that the prosecution witnesses had testified that 18 people were arrested on the day of the murder, the appellant among them, and that when he was arrested, the Samsung phone was not found on him.
45. Mr. Okango submitted that in his evidence, PW8 had testified that with DCI officers, they had arrested 18 people at Amish. He had further testified that they arrested the appellant at Ndal market with a mobile phone. Mr. Okango submitted that the appellant was not among the 18 people who were arrested at the scene on the material day, so the issue of contradiction in evidence did not arise.
 46. Regarding submissions by counsel for the appellant that the appellant was not found in possession of the phone, Mr. Okango contended that even under the [Penal Code](#), for purposes of recent possession, the definition of being in possession is not confined to physical possession. It was his submission that the Court has to consider the circumstances that actually can lead to a conclusion that somebody is in possession of an item. Mr. Okango contended that given the time frame from the date of the murder to when the appellant was said to have been the person who finally was found in possession of the phone, who had gone further to flush it and then passed it over to PW14, the doctrine of recent possession was properly invoked.
 47. Learned counsel further submitted that all the essentials of murder were proved. He dismissed the submission on behalf of the appellant that there was no direct evidence that the appellant was seen assaulting the deceased, his submission being that there is evidence that the deceased succumbed to mob injustice. Mr. Okango contended that when it comes to mob injustice, under the doctrine of common intention, even a single person in that mob is culpable even if he is not the person who inflicts the final blow; and that he is culpable for as long as he does not give evidence that shows that he did something contrary, such as to try and stop whatever was happening.
 48. Learned counsel submitted that in this case, the prosecution evidence on record shows that the deceased, at the time of being assaulted, had the phone since it was through that phone that he was able to call some of the prosecution witnesses. The phone having been found with the appellant, the conclusion is that the appellant was placed at the scene and having been placed at the scene, he did not give any evidence to show that while at the scene, he did not participate in what was happening. Mr. Okango prayed for the appeal on conviction to be dismissed.
 49. Regarding sentence, Mr. Okango submitted that the appellant was sentenced to 20 years imprisonment. The decision in *Muruatetu*, relied on by the appellant, did not therefore apply in this case as the trial court did not exercise its discretion whimsically, and this Court should therefore not interfere with the sentence.
 50. In response to questions from the Court on whether the doctrine of common intention could be invoked against the appellant unless it could be shown that he was at the scene of the murder, Mr. Okango submitted that common intention with the mob or as part of the mob that fatally assaulted the deceased could be inferred against the appellant. According to Mr. Okango, this could be done as the phone, which had been proved to be with the deceased at the time of the murder, was found in the appellant's possession. He conceded, however, that there was no evidence that the appellant was part of the mob that assaulted the deceased.
 51. Mr. Okango further conceded that someone could have picked up the phone at the scene of the murder, and there was no explanation on how the appellant came to be in possession of the phone.
 52. We have considered the proceedings before the trial court, as well as its judgment. We have also considered the appellant's memorandum of appeal, his submissions and the oral submissions by



learned Senior Prosecution Counsel, Mr. Okongo. The parties have addressed us under three limbs: the application of the doctrine of recent possession; the alleged contradictions in the prosecution case; and whether or not the trial court considered the appellant's defence.

53. In our view, this appeal turns on the question whether the trial court properly invoked the doctrine of recent possession in convicting the appellant of the murder of the deceased, Senior Sergeant Paul Kerich. As submitted by the appellant in his written submissions, the doctrine of recent possession is a principle of circumstantial evidence that allows the court to draw an inference of guilt where the accused is found in possession of recently stolen property in unexplained circumstances. As we consider whether the doctrine was properly invoked in this case, we shall consider whether there were contradictions in the prosecution evidence, and whether the trial court disregarded the appellant's defence.
54. We begin by considering what is not in dispute. On 3rd July 2018, Paul Kerich, a police officer, went to Binyenya village within Bungoma County when a demonstration by boda boda riders were demonstrating about the condition of the road. He got into an altercation with one George Simiyu. The deceased shot George, was chased by a mob of boda boda riders, and viciously stoned to death, as the post mortem report, produced in evidence by PW16, showed. The ingredients of the offence of murder as defined in section 203 of the *Penal Code*, as well as the element of malice aforethought as defined in section 206 of the *Penal Code*, are also not in dispute.
55. What is in dispute is the identity of the perpetrator(s) of the offence. On the day of the murder, the police arrested some eighteen persons, but ultimately charged six with the offence of murder of the deceased. Five of the accused persons were acquitted at the end of the trial.
56. It is not in dispute that there was no direct evidence placing the appellant, or indeed any of his co-accused before the trial court, at the scene of crime. Though PW8 testified that they arrested the appellant at Ndalu market with the phone on the day of the murder, he admitted in cross-examination that there were almost a thousand people at the scene, so he could not recognise the appellant. PW7 and PW15 gave similar testimony with respect to there being a large number of people at the scene of the murder, and that the appellant had not been seen at the scene. PW15, however, testified that the appellant was among the eighteen people arrested at Amish after the murder.
57. The contradiction between the testimony of PW8 and PW15 with regard to the arrest of the appellant, where he was arrested, and whether he was arrested with the phone is what the appellant cites as material contradictions which should have been resolved in his favour. This Court has noted this contradiction, but it is not central to the question whether the conviction of the appellant was safe. This question is best answered by considering the application of the doctrine of recent possession, and how the trial court considered the appellant's sworn testimony in his defence in arriving at its decision.
58. In its decision in *Isaac Ng'ang'a Kabiga & another v Republic* (*supra*) this Court stated:

“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.” (Emphasis added)

59. In *Erick Otieno Arum v Republic* [2006] eKLR, a second appeal on a conviction for the offence of robbery with violence, this Court, echoing the decision in *Isaac Ng’ang’a Kabiga*, stated:

“In our view, 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 (*sic*) 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 case the evidence as to search and discovery of the stolen property from the suspect is conflicting, then the court can only rely on the adduced evidence after analysing it and after it accepts that which it considers is the correct and honest version.:

60. In this case, the only evidence linking the appellant to the deceased was the Samsung phone, which was established, through the evidence of PW4, the widow of the deceased, and PW15, the investigating officer who produced call data from Safaricom, that it belonged to the deceased. The appellant was linked to possession of the phone by PW13, Peter, to whom he gave the phone to flush, and PW14, to whom he sold the phone. The appellant did not deny being in possession of the phone. Indeed, he was quite candid in his defence.
61. The Court notes the appellant’s statement in his defence that somebody brought the phone to him on 17th July 2018 and asked him to sell it for him. That he kept the phone for 11 days. After it was purchased by PW14, he sent the money through M-pesa, to the person who had brought the phone to him at the cyber café where he worked. He testified that he gave the police the name of Rosemary Nakhumicha, the name that appeared when he sent the money from the sale of the phone by M-pesa. He also gave the police the M-pesa transaction. He stated that the police did not arrest Rosemary Nakhumicha; nor did they follow up on the M-pesa transaction. PW14, to whom he sold the phone, was ‘arrested and released after paying money’.
62. In cross-examination, the appellant was almost endearing in his candour: he stated that it was true that he took the phone to PW13 to flush; it was true that he sold the phone to PW14; it was true that he sent the money upon sale of the phone by M-pesa. He had kept the phone for 1½ weeks before selling it to PW14. He did not look for the M-pesa statement to produce in evidence as the police had his phone.
63. When the Court pointed out the appellant’s testimony in his defence, Mr. Okango submitted that the appellant did not disclose to the prosecution the number to which he sent the money, which gave him the name Rosemary Nakhumicha, to enable the prosecution investigate and interrogate the testimony. Mr. Okango maintained that the appellant just gave a name without the number. As the analysis above illustrates, however, the record indicates that the appellant stated that he informed the police that he had been given the phone to sell; that he gave them the number to which he sent the money, and the name that appeared after he sent the money. He also took them to Emmanuel (PW14) who gave them the phone.



64. In arriving at the conclusion that the appellant was guilty of the offence as charged, the trial court reasoned as follows:

“Where the prosecution has established the facts that denote recent possession of a property or article in possession of or belong to the deceased at the time he was murdered, the person in possession assumes the evidential burden to show that he lawfully obtained the same.

Where the prosecution proves that an article which is proved to be connected directly with crime after commission of the crime may in certain circumstances lead to the irresistible inference that the possessor of the article participated in the crime. (See *Andrea Obonyo & others v Republic* 1962 EA. 542.

Accused 6 in this case readily admits that he was in privy possession of the mobile phone on 17.7.2018. His explanation is that he was given the same by a person he did not know first to flush and later to sell. The explanation by the possessor must be to such standard as to satisfy the court that the same was lawfully possessed. In this case the accused 6 neither stated the name of the person who allegedly gave him the phone, the alleged phone number he left nor the message he allegedly received. This shows the court that his blame of a 3rd person is not truthful. The court then under the doctrine of recent possession drives the inference that the accused obtained the same from the deceased that time of the murder. That being so I find that the prosecution sufficiently established that the accused 6 James Barasa Wafula participated in the murder of the deceased.”

65. Having considered the evidence before the trial court, we take the view that in reaching this conclusion, the trial court erred. The evidence indicates that the appellant informed investigators how he came into possession of the phone, almost two weeks after the murder of the deceased; and to whom and how he sent the money after selling the phone-through M-pesa. The prosecution did not, from the evidence before the Court, say that there was no such transaction, nor does the prosecution appear to have followed up on the said transaction or try to trace the recipient of the money, the said Rosemary Nakhumicha.
66. We note from the evidence of PW15 that the prosecution sought call data information about the deceased’s phone from Safaricom- that is how, it would appear, they found out that the appellant had the phone. They produced this data in evidence. Bearing in mind that the burden of proving an offence, beyond reasonable doubt, always rests on the prosecution, it cannot properly be said, in light of the above evidence, that the appellant did not satisfactorily explain his possession of the phone, and that therefore he must have taken it from the deceased at the time of the murder.
67. There is no evidence that the appellant was at the scene. He worked at a cyber-café in Ndalu, where he stated he was working on the material day. The appellant gave the name that appeared in his phone when he sent the money after selling the phone to PW14. He gave the police the M-pesa statement on the transaction. We take judicial notice that M-pesa transactions show the name and number of the person receiving the money. The prosecution had a duty to investigate the statements by the appellant regarding how he received the phone, how he disposed of it, and how he dealt with the money received from PW14.
68. In our view, the trial court did not properly address itself to the question whether the evidence before it allowed it to properly draw the inference that the appellant was guilty of the murder of the deceased. We are satisfied that his conviction was not safe, and it cannot stand. He was a young man, 21 years old at the time of the offence. He was dishonest, receiving a phone which he knew or ought to have known was obtained in dishonest circumstances - hence the request to flush it. He willingly participated in



disposing of the phone. He displayed a total lack of integrity, but the evidence does not prove him, beyond reasonable doubt, a murderer, or to have participated in the brutal mob murder of the deceased.

69. Accordingly, we allow his appeal and set aside his conviction and sentence. He shall be released forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF NOVEMBER, 2023

P.O. KIAGE

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****JUDGE OF APPEAL**

MUMBI NGUGI

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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

Signed

DEPUTY REGISTRAR

