



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A.)**

**CRIMINAL APPEAL NO. 20 OF 2013 (R)**

**BETWEEN**

**ALLAN BARASA OBADA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**(Appeal from the judgment of the High Court of Kenya at Busia, (Muchelule & Muchemi, JJ.)  
dated 6th March, 2012)**

**in**

**HCCRA NO. 39 OF 2011)**

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**JUDGMENT OF THE COURT**

The appellant together with one Asili James were convicted by the Senior Principal Magistrate's Court at Busia of robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code. The offence was committed on 15th November, 2009 at Busibo village, Sigalame sub- location in Samia District. The appellant and his accomplice were said to have robbed Calistus Wafula of one DVD, a mobile phone, a pair of black shoes, assorted clothing and cash Kshs.7,000/=

After a full trial, the appellants were sentenced to death as by law prescribed. Their first appeal to the High Court was unsuccessful, hence this second appeal. The appellant's conviction was based on the doctrine of recent possession of some of the aforesaid items that the complainant had been robbed of. The trial court rejected the evidence of identification of the appellant and the High Court upheld that position.

In the appeal before this Court, Mr. Olel, learned counsel for the appellant, raised two grounds of appeal, namely; that the appellant was convicted on the basis of a defective charge; and that there was no evidence that the appellant was found in possession of items that had recently been stolen from the complainant.

It is necessary to set out the facts of the case, albeit briefly, before we consider the arguments raised on appeal.

On 15th November, 2009 at around 9.00p.m., the complainant and his wife were attacked by a group of

more than four men in their house. They were violently robbed of the aforesaid items. The appellant was arrested almost ten months after the robbery. Asili James, who was the first accused before the trial court, was arrested almost immediately after the incident in a house where he was hiding.

Sergeant Wilson Kinyamal, PW 4, testified that shortly after the robbery, he was on patrol with other officers when they were informed that there were four Ugandans in a certain house. The four were suspected to be robbers. As they approached the house, some people ran away. On entering the house, they found the appellant's wife. They recovered clothes and a DVD machine that belonged to the complainant. They were in the house where Asili James had hidden himself.

Upon interrogating the wife of the appellant, she told them that the items had just been taken there by some Ugandans who had since disappeared, except for one, (Asili James) who was hiding in the house. The appellant was not in the house at the material time. The police arrested Asili and charged him accordingly. Ten months later the appellant was arrested in some unclear circumstances and charged with robbery with violence as well. His case was consolidated with that of Asili James.

In his submissions, Mr. Olel stated that the charge was defective because it did not indicate that the appellant and his co-accused were armed with dangerous weapons, which is a key ingredient in a charge of robbery with violence. He cited this Court's decision in *NGOME PATRICK & ANOTHER V REPUBLIC* [2005] eKLR.

Secondly, Mr. Olel submitted that the trial court as well as the High Court misdirected themselves in their application of the doctrine of recent possession. The appellant was not found in possession of any stolen goods. There was nothing to connect him to the stolen goods, counsel submitted.

Ms Nyamosi, Senior Assistant Deputy Public Prosecutor, opposed the appeal. She submitted that the charge was not defective as it contained all the necessary ingredients for the offence of robbery with violence; only one of them needed to be proved and was duly proved.

Regarding the doctrine of recent possession, Ms Nyamosi submitted that some of the goods that had been stolen were recovered from the house of the appellant, although he was not there.

We have considered the record of appeal as well as the submissions by counsel. Regarding the first ground of appeal, we do not agree that the charge was defective. We do not think that in the circumstances of the case that was before the trial court it was necessary to state in the charge sheet that the appellant and his accomplice were armed with a dangerous or offensive weapon. As long as any one of the other ingredients of the offence of robbery with violence were there, that was sufficient.

In *JOHANA NDUNG'U V REPUBLIC* [1995] LLR 387, this Court held that the ingredients that are required in a charge of robbery with violence are:

if the offender is armed with any dangerous or offensive weapon or instrument;

or

if the offender 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 the offender wounds, beats, strikes or uses any other personal violence to any person.

Proof of any one of the above ingredients is sufficient. See also *OLUOCH V REPUBLIC* [1985] KLR 549.

In *NGOME PATRICK & ANOTHER V REPUBLIC* (Supra), this Court stated that:

“... where the Prosecution is relying on the element or ingredient of being armed, it must be stated in the particulars of the charge that the weapon or instrument with which the accused was armed was dangerous or offensive”.

The prosecution did not allege that the robbers were armed with dangerous weapon. It however demonstrated that the robbers were four in number and that they visited violence upon the complainant immediately before or immediately after the robbery.

We therefore dismiss the first ground of appeal.

Turning to the second ground of appeal, the appellant was not found in possession of any of the stolen items. It is his co-accused before the trial court who was found hiding in a house where the stolen goods had been hidden. A proper reading of the evidence of PW 4 reveals that the wife of the appellant told the police that “it was Ugandans who ran away but there was one in one of the houses who had locked himself inside”. The appellant’s co-accused was found inside the house where he had locked himself up. The appellant was not there.

The appellant was arrested nearly ten months after the date of the robbery. The fact that some of the stolen items were recovered from his house where Asili was hiding did not necessarily imply that the appellant was found in possession of items that had been recently stolen.

In *ARUM V REPUBLIC*, [2005] eKLR, this Court held that the doctrine of recent possession is applicable where the court is satisfied that the prosecution has proved the following:

that the property was found with the suspect;

that the property was positively identified by the complainant;

that the property was recently stolen from the complainant.

In our view, it was not positively proved that the appellant had been in possession of the recovered items.

As the appellant’s conviction was based entirely upon the evidence of recent possession of stolen goods, which was not proved, this appeal must be allowed, which we hereby do.

The appellant is ordered to be set at liberty unless otherwise lawfully held.

DATED and Delivered at Kisumu this 11th day of October, 2016.

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**K. MURGOR**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**