IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, MWILU & ODEK, JJ.A)

CRIMINAL APPEAL NO. 54 OF 2015

BETWEEN

ABDI YUSUF MAALIM
…….APPELLANT

AND

REPUBLIC ……..……
RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi, (Justice Muchemi) dated 19th December, 2013

in

H. C. Cr. Case No. 51 of 2010)

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JUDGMENT OF THE COURT

1. **ABDI YUSUF MAALIM** (Appellant) was tried, convicted and sentenced by the Senior Resident Magistrate Wajir, to suffer death as by law prescribed for the offence of robbery with violence contrary to the provisions of **section 296(2)** of the **Penal Code**. The appellant was dissatisfied and preferred an appeal to the High Court sitting in Nairobi. His appeal was not successful, hence this his second, and most probably the last appeal.

2. The appellant raised seven grounds of appeal; that the last appellate court judges erred in law by failing to analyse and re-evaluate the entire evidence and find that there was no evidence to convict; by passing a conviction and sentence based on the doctrine of recent possession; by failing to observe the contraventions of **section 163(c)** of the **Evidence Act**; by failing to comply with **section 169** of the **Criminal Procedure Code**; by basing conviction and sentence on scanty and flawed prosecution evidence; by failing to observe contravention of **section Article 50(1)** of the **Constitution** and by failing to comply with the provisions of **section 177** of the **Criminal Procedure Code**.

3. At the hearing of this appeal, learned counsel Mr. Ngumbau for the appellant submitted that the two courts below improperly and wrongly applied the doctrine of recent possession in that those courts did not endeavour to establish that the elements of the said doctrine were proved. Counsel

submitted further that the 1st appellate court merely relied on the authority of **Arum v R Ksm Criminal Appeal no. 85 of 2005** but failed to relate it to the circumstances of the appeal before them. Mr. Ngumbau added that the allegedly stolen phone was not positively identified to be that of the complainant. Counsel stated that the complainant never mentioned in evidence that he had the receipt given to him when he bought the phone and a receipt produced by the investigating officer PW4, was of no probative value.

4. Mr. B. L. Kivihya appearing for the Director of Public Prosecutions opposing the appeal as one without merit submitted that the doctrine of recent possession was properly applied. He added that the ingredients of the doctrine were present and that possession was proved. Counsel concluded his submissions by stating that the two courts below properly discharged their mandate and urged us to dismiss this appeal as one totally without merit.

5. This is a second appeal. On second appeals this Court only concerns itself with points of law, being bound by the concurrent findings of fact made by the two courts below, unless those findings be based on not the evidence adduced at trial see **Njoroge v R [1982] KLR 338.**

6. The trial court in convicting the appellant herein stated;

> ***"My finding is that the accused was found in possession of the phone which was robbed of the complainant barely a day after the robbery. His attempt to claim ownership of the said***
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> ***phone was at its best flimsily*** (sic) ***given the fact that PW1***
>
> ***had full proof of ownership."***

On its part the first appellate court agreeing with the final court on the reasons for the conviction stated;

> ***"The appellant did not give any explanation as to how he came into possession of the phone or even explain the circumstances surrounding his arrest."***

In the case of **Arum v Republic, Court of Appeal at Kisumu Criminal**

Appeal no. 85 of 2005, it was held that the doctrine of recent possession is applicable where the court is satisfied that the prosecution have proved the following:

a. **that the property was found with the suspect;**

b. **that the property was positively identified by the complainant;**

c. **that the property was stolen from the complainant;**

d. **that the property was recently stolen from the complainant.**

The court in that case upheld the conviction of the appellant based on recent possession as opposed to identification by the complainant.

7. The first appellate court also cited the case of **George Otieno Dida alias Stevo & another Vs Republic** for the same proposition that the appellant lost the appeal because the item stolen was found to have been recently stolen and the appellant was found to be in possession thereof. The court below found the import of the two authorities they relied on to be that the items found in the possession of the appellants were recently stolen but the same were not identified by the complainants. Whether that is what is espoused by the doctrine of recent possession is what this appeal is about and it is what we are called upon to determine. Are the ingredients of recent

possession as set out in **Arum** (*supra*) separable?

8. We think that those ingredients of the doctrine under consideration are not stand alone principles. That is quite clear from the wording of the doctrine and the use of the conjunctive 'and' between them. In **R v James Loughlin [1951] criminal appeals Report of 1951 – 1952 at page 69,** Lord Chief Justice of England, Justice Lynskey laid down the principles when he stated;

> ***"If it is proved that promises have been broken into <u>and</u> certain property has been stolen from the premises <u>and</u> that very shortly afterwards, a man is found in possession of the property, that is certainly evidence from which the jury can infer that he is the housebreaker or shop breaker"*** (emphasis added).

   The doctrine of recent possession is of course applicable in cases of robbery with violence, manslaughter, murder, among other charges, **see Stephen Njenga Mukiria & Another V R Nkr Criminal Appeal no. 175/2003**, wherein it was also determined that before relying on the recent possession doctrine, possession must be positively proved, that is to say that the recently stolen property was found with the suspect; the ownership of the property by the complainant must be proved and finally that there must be evidence that the property was recently stolen.

9. What is patently clear from the record is that the 1st appellate court did not interrogate the evidence relevant to the doctrine of recent possession. All that court did, with respect, is repeat what the authorities it cited stated. There was more for that court to do, which was to relate the law to the evidence on possession and determine whether or not possession in the appeal before them was proved. In so far as they failed to do that, they erred. They did not discharge their mandate as a 1st trial court to analyse, assess and re-evaluate the evidence on record to come to their own decision; which may or may not have been the same as the trial court's.

10. We have, on our part, looked at the record most carefully and must agree with Mr. Ngumbau learned counsel for the appellant that the elements pre-condition to proof of recent possession were not satisfied. That is so because none of the two courts below endeavoured to have the phone positively identified as the one stolen from the complainant. No identifying mark on the phone or even the serial number allegedly on a receipt was shown to the trial court as proof of identity of the stolen phone. That receipt allegedly given to the complainant when he bought the phone was never mentioned by the complainant in his evidence. Its production by the investigating officer without concretely relating it to the serial numbers on the phone was evidence of no probative evidence value. It is our finding in these circumstances therefore, that the phone not having been positively identified to be that recently stolen from the complainant, the doctrine of recent possession could not safely be relied upon to form the basis of a conviction.

11. It is the law that once an accused person is found in possession of a recently stolen item, then the burden, unlike in all criminal cases where the burden of proof is the prosecution's to discharge, shifts to that accused person to explain how he came to be in possession. See **Paul Mwita Robi V Republic Ksm Criminal Appeal no. 200 of 2008**, where this Court differently constituted stated;

> ***"Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is (sic) especially within the knowledge of the accused and pursuant to the provisions of section 111 of the Evidence Act chapter 80, the accused has to discharge that burden.***
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> The provision states:
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> ***"When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, qualification to the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him.***

Thus while the law is that generally in criminal trials, the prosecution has the burden of proving the case against the accused throughout and that burden does not shift to the accused, however, in a case where one is found in possession of a recently stolen property like in this case, the evidential burden shifts to him to explain his possession. That explanation only needs to be a plausible one but he needs to put it forward for the court's consideration.

12. In the appeal before us, the stage was not reached where the appellant had to explain possession of a recently stolen phone since proof of the phone being recently stolen was absent, as we have shown above.

13. That being the case the appeal is found to be meritorious and the same is allowed, the conviction is quashed and the sentence is hereby set aside. The appellant is forthwith set at liberty unless he be otherwise lawfully held.

Delivered and Dated at Nairobi this 11th day of December, 2015.

E. M. GITHINJI

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

J. OTIENO-ODEK

…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR