Case Number:	Criminal Appeal 414 of 2010
Date Delivered:	09 May 2016
Case Class:	Criminal
Court:	Court of Appeal at Busia
Case Action:	Judgment
Judge:	John walter Onyango Otieno, Festus Azangalala, Sankale ole Kantai
Citation:	Cyprian Ingira Ikobwa & another v Republic [2016] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Busia
Docket Number:	-
History Docket Number:	HCCRA NO. 79 OF 2006
Case Outcome:	Appeal dismissed
History County:	Kakamega
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT BUSIA

(CORAM: ONYANGO OTIENO. AZANGALALA & KANTAI, JJ.A)

CRIMINAL APPEAL NO. 414 OF 2010

BETWEEN

CYPRIAN INGIRA IKOBWA .....1ST APPELLANT

STEPHEN AKHONYA MUSONYE ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from Judgement of the High Court of Kenya at Kakamega (Muchemi & Chitembwe, JJ) dated 8th June, 2010

in

KAK. HCCRA NO. 79 OF 2006

****

JUDGEMENT OF THE COURT

In this second appeal, ***Cyprian Ingira Ikobwa*** (1st appellant) and **Stephen Akhonya Musonye** (2nd appellant) challenge their convictions and sentences by the Chief Magistrate's Court, Kakamega for two offences of robbery with violence contrary to ***section 296 (2)*** of the Penal Code, one offence of being in possession of a firearm without a Firearms Certificate contrary to ***section 4 (1)*** as read with ***section 4 (3) (a)*** of the Firearms Act and one offence of being in possession of ammunition without a Firearm's Certificate contrary to ***section 4 (1)*** as read with ***section 4 (3) (a)*** of the same Act.

The particulars of the first count were that the appellants on 7th February, 2005 at Shibuye area in Kakamega District within Western Province, jointly with others not before court, while armed with dangerous weapons namely a pistol, robbed ***Collins Wanga*** of cash sum of Kshs.11,000/= and immediately before or immediately after the time of such robbery threatened to shoot the said Collins Wanga. The second count stated that the appellants in consort with others not before court on the same date, at the same place and while similarly armed, robbed ***Dave Koech*** of one mobile phone-make Alcatel valued at Kshs.5,500/= and immediately before or immediately after the time of such robbery threatened to shoot the said Dave Koech. The third count was that of being in possession of a firearm without a Firearms Certificate in that the appellants on the same date and at the same place jointly with others not before the court were found in possession of a pistol - make Browning serial number 245pm 49599 without a Firearms Certificate. The fourth count was of being in possession of ammunition without a Firearms Certificate in that on the same date and at the same place the appellants, jointly with others not before the court, were found with two rounds of ammunition without a Firearms Certificate.

The appellants pleaded not guilty but after a full hearing in which nine prosecution witnesses testified and the appellants also made sworn statements in their defence, they were convicted as charged and each sentenced to death on the 1st count of robbery with violence and to seven years imprisonment each on the third and fourth counts of being in possession of a firearm and ammunition without Firearms Certificates. The sentence on count two was left in abeyance whilst the sentences on counts three and four were to run concurrently.

The appellants appealed to the High Court but their appeals were dismissed and hence this second appeal.

Section 361 (1) of the Criminal Procedure Code provides that this Court's jurisdiction is confined to matters of law only. Looking through the appellants' respective memoranda of appeal and the submissions of learned counsel for the appellants ***Mr. Onsongo*** and ***Mr. Okuta***, the following broad issues of law have been raised:

(1) Failure of the High Court to re-evaluate the evidence;

(2) Weak evidence of identification or identification which was not positive;

(3) Improper application of the doctrine of recent possession;

(4) Reliance upon inadmissible evidence;

(5) Failure to prove the case beyond reasonable doubt;

(6) Shifting the burden of proof;

The background facts are in our view straight forward and disclose three narratives. The first narrative was as follows:- ***Collins Wanga*** (PW1) (Wanga) ***Javan Morara Rioba*** (PW2) (Rioba) and ***Mohammed Salim Ghalib*** (PW4) (Salim) at the material time were employed by New Salama Bakery of Bungoma. Wanga was a salesman, Salim a driver and Rioba a turnboy. On 7th February, 2005 the three set off from Bungoma in motor vehicle registration number KAR 909B for Kapsabet as they sold bread en-route. On their way back, they took the Shinyalu-Khayega route. As 6.00 pm approached, they reached Shibuye area where a man with a handcart appeared on the road and could not give way to the trio. Wanga, who was then driving the motor vehicle, stopped and reversed the motor vehicle. As he did so, two men emerged from the side of the road and one of them shot at Wanga but missed. The other ordered him to lie down in the motor vehicle. He obeyed. A second shot was fired which passed above the bonnet. Salim and Rioba fled from the vehicle as the attackers demanded money from Wanga. They ransacked his pockets and took Kshs.11,000/= but still demanded more money which Wanga said was with his collegues who had fled. A pick-up track appeared on the scene from the opposite side and the attacker with the pistol rushed towards it as the other guarded Wanga. When the people in the pick-up were subdued the attacker who was guarding Wanga left guarding him to join his colleague who was with the pick-up victims. Wanga got the chance to escape and ran to a nearby homestead. Members of the public were attracted to the scene by the -gunshots and engaged the attackers with stones.

It would appear from our reading of the record that Wanga, Salim and Rioba returned to the scene at different times but before proceeding with that aspect of the narrative, we tum to the second narrative involving the attack on the people in the pick-up registration number KAG 309K. On the same 7th February, 2005 at about the same time the said motor vehicle was being driven by ***Daniel Kimutai***

Koech (PW 5) (Koech) along Khayega - Shinyalu road heading to Kapsabet. He was with one ***Kimangetich***. As they approached Shibuye area at a place called Irobo, they saw a handcart infront of a canter motor vehicle and thought there had been an accident. Within no time two people, one armed with a pistol, approached Koech and demanded the ignition key of his vehicle. He surrendered the same. Koech and his companion were then ordered to lie down on the floor of the pick-up with one attacker lying on them. The other attacker tried to drive the pick-up without success and demanded that Koech drives it. Koech however informed him that he too could not as the pick-up had stalled. The attackers then moved out of the pick-up and started running away but not before taking his Alcatel mobile phone. Koech then heard gunshots and shouts from members of the public to the effect: ***"ua" "ua" ("kill" "kill").***

Salim seems to have been the first to return to the scene from his hideout. We say so, because the record shows he returned to see the thug who had a pistol being stoned to death by members of the public. He also saw another thug attempt to run away but was again stoned to death. Salim also saw a third attacker almost being lynched by members of the public.

Wanga and Rioba would appear to have returned to the scene almost at the same time after Salim. We say so, because of what they said in their testimonies at the trial. Rioba said:-

"I came back and met Collins. Mohammed told us that one gangster had been killed. I rushed to the scene and found members of the public lynching another gangster."

And Wanga said:-

"I later heard that one of the gangsters had been killed by members of the public. I went out of the home where I had taken refugee (sic) and proceeded to the scene where I found two gangsters had already been-killed. I sent - bicycle taxi operator to go and report the incident to Shinyalu AP Camp."

It is not clear from the record whether the APs and police officers arrived at the scene separately or at the same time. According to Wanga, APs responded quickly and rescued one of the people who were being attacked by members of the public. They arrested him and took him to their camp and when they returned, they found when police officers had arrived at the scene. This version of events received support from Rioba.

The version given by PC ***Benard Amboko*** (PW6) (PC Amboko) was somewhat different. He testified that when he was informed of the robbery at about 5.45 p.m., he rushed to the scene with other police officers and found when two people had been killed and the 1st appellant had been beaten by members of the public and lay on the ground semiconscious. He rescued him and took him to Shinyalu DO's office. He returned to the scene then took the handcart, the bodies of the two attackers who had been killed and a firearm loaded with 4 rounds of ammunition recovered at the scene. The handcart was kept at Kakamega policestation and the bodies were taken to Kakamega General Hospital mortuary. He then went back to Shinyalu D.O's office and escorted the 1st appellant to Kakamega Police station after interrogating him.

PC Amboko also arrested the 2nd appellant who was said to have given ***Dennis Makaka Ligami*** (PW7) (Ligami) a mobile phone which was later identified by Koech, one of the victims of the robbery. PC Amboko also sent the recovered firearm with the rounds of ammunition to ***Emanuel Langat*** (PW8) (Langat), a forensic firearms examiner, for examination. The latter demonstrated that the firearm was capable of firing the ammunition which was found in it.

The third narrative involved ***Silvanus Ashiono*** (PW3) (Ashiono). Before the aforesaid robberies, Ashiono, a farmer-cum- businessman, lost his handcart. That was on 2nd February, 2005. He reported the loss to the area Assistant Chief who promised to investigate. On 19th February, 2005 police officers from Kakamega police station went to his home and invited him to the police station to check on a handcart which had been recovered at a robbery scene. He went to the police station and confirmed that the handcart was indeed his. The handcart was later photographed by CPL ***Frank Anunda*** (PW9) of Bungoma scenes of crime office which photograph he produced at the trial.

The appellants were then charged with the offences stated herein above. The 1st appellant, in a sworn statement, denied committing the offences. He testified that on the morning of 7th February, 2005 he set off on his bicycle to sell his products - baking pans. He supplied his customers along Mutemo-Malinya-Shinyalu road and at 5.00 pm commenced his return journey. His bicycle developed problems near Shinyalu AP camp and started zig-zagging on the road. A pick-up which was following him hit him by its side mirror and he fell on the road. The pick-up stopped and its occupants beat him up for nearly causing an accident. APs enquired about what was happening and the pick-up driver informed them that he had nearly caused an accident. He was then taken in by the APs who later took him to Kakamega Police station where he was later charged.

The 2nd appellant, also in a sworn statement, denied committing the offences. He testified that on 8th February, 2005 he operated his bicycle taxi business in Kakamega town as usual until a police officer arrested him at Amalemba area in Kakamega town and took him to Kakamega Police station where he was later charged as already stated. It was his defence that his neighbour, Ligami, -had framed him.

In his judgment, the learned Senior Resident Magistrate ***(E.O. Obaga)*** set out the evidence which was before him in some detail and having done so, addressed himself to the ingredients of the offences the appellants faced. He stated thus:-

"There is no doubt that the complainant (sic) were violently robbed. There is evidence that the thugs were armed with dangerous weapon to wit a pistol which was recovered at the scene and was produced as Exhibit 1. This pistol was taken to a ballistic expert PW8 Emmanuel Langat who examined it and found it to be in working condition. He certified it as a pistol which was capable of firing as defined under the Firearms Act . The thugs were in a group some of whom were felled down by irate members of the public. There is evidence that there were 2 live ammunition which were in the recovered pistol which were also sent to a ballistic expert The two live ammunitions were tested by PW 8 using the recovered pistol and were confirmed to be live ammunition as defined in the Firearms Act Chapter 144 Laws of Kenya."

On the issue of identification of the 1st appellant, the learned trial magistrate stated:-

"The 1st accused was arrested at the scene of robbery and served (sic) from being lynched. The robbery took place at around 6.00 pm. There was no darkness. The 1st accused was also seen by PW2 Evans Mwara Rioba and PW4 Mohammed Salim Ghalib. The two witnesses that is PW2 and PW4 were at the driver's cabin and they all saw the 1st accused who was pulling the handcart. This was before darkness and therefore there can be no question of mistaken identity."

With regard to the 2nd appellant, the learned trial magistrate stated:-

"Though the evidence of PW2, 4 and 5 is that they saw the 2nd accused among the robbers, this evidence is one described in practice as dock identification. Dock identification though known to be one of the weakest forms of identification, I nevertheless accept the same given that the

robbery took place during day time and the witnessess who saw him had the opportunity to do so. PW5 at first thought that the Canter which he saw ahead had hit a handcart but realised that this was not the case when the two were (sic) hurried to where his pick-up was and ordered him out of the driving seat. There is no evidence that the 2nd accused was masked. There was time for him to see the 2nd accused. I therefore find that the dock identification coupled with the fact that 2nd accused took the phone to 7th prosecution witness is enough to make a finding that the 2nd accused was actually among the robbers."

On the doctrine of recent possession the learned trial magistrate stated:-

".....there-is evidence- from PW7 Dennis-Maka-Ligami that a few hours after the robbery the 2nd accused brought an Alcatel mobile phone which he told PW7 that he had picked up from Muliro gardens in Kakamega Town. He asked PW7 to operate it for him so that he (accused) could make a call to his sister. After PW9 opened the keypad he handed the phone to 2nd accused to call but as the accused tried to call the phone went off. When PW7 asked for a pin number the accused could not provide one. He instead left it with PW7 so that he could charge it for him. Later on the following day PW7 got information that police officers were looking for the 2nd accused he suspected that the 2nd accused was being sought for (sic) in connection with the phone which he had left with him the previous night. He went looking for him at Kakamega town where he was operating a bicycle taxi……

The mobile phone which had been taken from PW7 the previous day was recovered.

.....The mobile phone was positively identified by the complainant in count 2.

……

I find that the doctrine of recent possession is applicable in this case."

The Learned Senior Resident Magistrate in the end found the appellants guilty as charged, convicted them and sentenced them as already stated.

The findings of the learned trial magistrate became the subject of the first appeal before the High Court which considered the entire evidence and in dismissing the appeals stated as follows:-.

"According to PW3, Silvanus Ashiono, he lost his handcart on 7/2/2005. He didn't know who had stolen it.The 1st appellant is his neighbour who lives about one kilometer from his homestead. The same handcart was used to block the motor vehicle that was being driven by PW1. In their evidence PW1, PW2, and PW4 testified that 1st appellant was one pushing the handcart .We do found that it was not a mere coincidence that a handcart was being pushed on the road at the same time robbers emerged from the side and started shooting. We note that none of the members of public testified as to how the 1st appellant was beaten or how they connected him to the crime. However from the evidence of PW1, PW2, PW4 and PW6 we are satisfied that the 1st appellant was part of the gang that committed the robberies

.....

.....

With regard to the 2nd appellant, it is the evidence of PW5 that he stopped at the scene. Two robbers ran towards him and asked for the ignition key. He was robbed of his Alcatel mobile phone. This was about 5.50 pm. On the same day, the appellant went to PW7's home with the same phone. The 2nd defendant's defence is that he was arrested on 8th February, 2005 while on his duties. We do find that the 2nd appellant gave the stolen phone to PW7. This was a few hours after the robbery. We hold that the 2nd appellant was part of the robbers and participated in the robbery. According to PW4 he saw the 2nd accused during the robbery. He had a hammer. From the evidence of PW1, PW2 and PW4, there were more than three robbers. PW2's evidence is that the 2nd appellant was amongst the robbers who tried to hijack the pick-up."

The learned Judges of the High Court in the end dismissed the appellants' appeals.

Mr. Onsongo learned counsel for the 1st appellant addressed us at length on the issues already identified above and relying on various decisions of this Court, urged us to allow his client's appeal. Mr. Okuta also addressed us on the same issues and emphasized that the learned trial magistrate misapplied the doctrine of recent possession with respect to the 2nd appellant. It was his view that the evidence of Ligami should not have been relied upon.

Mr. Abele, learned Assistant Director of Public Prosecutions opposed both appeals and submitted that the grounds upon which the appellants were convicted were sound as the evidence was overwhelming against both appellants.

We have considered the record of appeal the submissions of counsel and the relevant case law. There is no dispute that Wanga was robbed of Kshs.11,000/= and Koech was robbed of a mobile phone. It was also clear to us from the evidence, an outline of which we have given above, that the trial court and the High Court accepted that both Wanga and Koech were threatened with violence immediately before the robbery. There was no medical evidence adduced at the trial but the attackers were more than four, so the offences of robbery with violence under ***section 296 (2)*** were proved on the evidence. Thus the main question was only as to whether the appellants were among the attackers.

The law as to the duty of this court, indeed any court, when considering a case such as is before us which depends wholly or largely on the correctness of the identification of an accused person is settled. The court has a duty to ensure that the evidence of identification is water-tight before basing a conviction on it. There is a plethora of authorities on this principle including the case of ***Roria -Vs- R [1967] EA 583***, where the predecessor of this Court stated ***(as per Sir Clement De lestang V.P.),*** inter alia, as follows:-

"A conviction resting entirely on identity invariably causes a degree of uneasiness, and as Lord Gerdner L.C. said recently in the House of Lords in the course of a debate on section 4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts:

"There may be a case in which identity is in question and if any innocent people are convicted today I should think that in nine cases out of ten if there are as many as ten it is in a question of identity.""

Those sentiments found favour in the case *of* ***Kamau -Vs- Republic [1975] EA139*** where it was stated:-

"The most honest of witnesses can be mistaken when it comes to identification"

It is therefore clear beyond peradventure that the evidence of identification needs to be examined carefully before a court can enter a conviction against an accused person. We have on numerous occasions given guidelines on the manner of handling evidence of identification particularly visual identification. In the case of ***Cleophas Otieno Wamunga -Vs - Republic*** - ***[Criminal Appeal No.20 of [1989] (UR),*** this Court differently constituted stated ***inter alia,*** as follows:-

"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Widgery C.J. in the well known case of R -Vs- Turnbull [1876] 3 ALL ER 549 at page 552 where he said:-

"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometime made.""

In the appeal before us we have already stated that the learned Senior Resident Magistrate set out in his judgment the evidence which was placed before him. He then analyzed and evaluated it in detail and came to the conclusion that the offences charged had been proved. The High Court likewise set out the evidence, in outline, and in our view carefully analyzed the same afresh and came to its own independent conclusion as it was bound to do in law.**(**see the case of ***Okeno -Vs- Republic [1972]*** EA p.32, among others.**)**

As the record we have set out before, in outline, shows, the two courts below reached concurrent findings on matters of fact as regards the identification of the appellants which was that both appellants were correctly identified as among the attackers who robbed the complainants. It is the law that we cannot interfere with a finding of fact unless we are satisfied that there was no evidence at all to support the same or that there was a serious misdirection which led to mis justice. In the case of ***Mriungu -Vs- Republic [1983] KLR 455,*** we said:-

"Where a right of appeal is confined to questions of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law and it should not interfere with the decision of the trial or first appellate court unless it is apparent on the evidence that no reasonable tribunal could have reached that conclusion, which would be the same thing as holding that the decision is bad in law."

With regard to the 1st Appellant in the case before us both courts below accepted the evidence of Wanga, Rioba and Salim that he was the attacker with the handcart which he put in the way of their motor vehicle. The two courts also accepted the evidence of the same witnesses that the 1st appellant was attacked at the scene by members of the public. The evidence of the 1st appellant being found at the scene was buttressed by the testimony of PC Amboko whose evidence was also accepted by both courts below. In those premises we do not think anything should turn on whether the 1st appellant was rescued by PC Amboko or APs of Shinyalu DO's office or on whether the 1st appellant pushed or pulled the handcart or threw it in the way of the canter. The offence took place at about 6.00 p.m. and no one alleged that it was dark. The two courts below accepted that it was still day time and it was not dark.

With respect to the 2nd appellant, the trial court accepted the testimony of Koech that he identified him at the scene as one of the attackers who ordered him out of his motor vehicle. The trial court also accepted the evidence that the 2nd appellant was found in possession of Koech's Alcatel mobile phone the same evening after the robbery which evidence was buttressed by that of Ligami. Once again the evidence of recent possession of the Alcatel mobile phone was accepted by the High Court.

It is therefore clear that the two courts below had before them not just visual identification of each appellant but the arrest at the scene with respect to the 1st appellant and possession of recently stolen property with respect to the 2nd appellant.

In the premises we are unable to agree with M/s Onsongo and Okuta learned counsel for the appellants that the evidence of identification was not positive. In those premises the appellants' appeal challenging their conviction on account of Improper or mistaken identification cannot be sustained. Our analysis further demonstrates that the High Court did actually analyze and consider the evidence against each appellant and came to the conclusion that the appellants' respective appeals challenging their identification were baseless. In our view the ground alleging failure of the High Court to re-valuate the evidence is clearly untenable.

The other issue raised before us by the appellants was that the Senior Resident Magistrate and the High Court did not consider that the appellants especially the 2nd appellant was convicted on inadmissible evidence. This ground was raised because, according to counsel for the 2nd appellant, the 2nd appellant was arrested and the recovery of the Alcatel mobile phone was made on the basis of information extracted from the 1st appellant by PC Amboko. Our recent decision in the case of ***Rafael Isolo Echakara & Another -Vs- Republic [Criminal Appeal No.44 of 2003] (UR)*** was invoked in support of that submission. We are however of the view that that decision is clearly distinguishable from this appeal. We are of that view because in the Echakara case what amounted to a clear confession by one accused led to the arrest of his co-accused and the recovery of allegedly stolen property. We held that that evidence was inadmissible in law having been extracted by a Senior Sergent who had no capacity to receive the accused's confession.

In the appeal before us, the record of the trial court speaks for itself. On that aspect of the evidence of PC Amboko, the trial court stated:

"Besides this his arrest was facilitated by the 1st accused who is said to have mentioned him though this evidence is not itself admissible."

So, the learned Senior Resident Magistrate was alive to the indmissibility of the information the 1st appellant gave to PC Amboko. The High Court on its part did not consider that aspect of the evidence in its judgment. Our own analysis of the evidence shows however that the 2nd appellant was not convicted solely on the evidence of PC Amboko. There was also the evidence of Koech and Ligami which independently was relied upon to convict the 2nd appellant. In the end in our view the ground of appeal challenging the conviction of the appellants on account of reliance upon inadmissible evidence cannot also be sustained.

Counsel for the 2nd appellant vigorously submitted that the 2nd appellant was not found in possession of the mobile phone stolen from Koech and further that if the evidence of alleged possession of recently stolen mobile phone was removed, the identification of the 2nd appellant by Koech and Ligami would remain dock identification which was worthless without an earlier identification parade. In making that submission, counsel for the 2nd appellant was restating a time tested principle enunciated in several decisions of this Court including that of ***Kiarie –Vs Republic [1984] KLR 740.***

On that submission the learned trial magistrate stated:-

"I have no doubt in the evidence of PW7 as to how the 2nd accused brought the phone to him. There was no evidence to suggest any bad blood between the 2nd accused and PW7. The 2nd accused denied the evidence of PW7 in passing. The 2nd accused was found to have taken a stolen phone to PW7. This was a very recent stolen property recovered. In the circumstances the 2nd accused was under obligation to explain the circumstances under which he obtained the mobile phone. He did not do so. The law is clear that where it [is] shown that an accused was in possession or handled a recendy stolen property he is under obligation to explain how he came by it otherwise if he does not do so,. it will lead to an inescapable conclusion. (sic) That he is a thief or robber. See the case of Mwachanje & 2 others -Vs- Republic KLR 2002 vol. 2 page 341."

So, the learned trial magistrate accepted, as true, the evidence of Ligami that the 2nd appellant gave him the subject mobile phone first to unlock it and secondly to charge the same for him. The learned trial magistrate explained why he believed the evidence of Ligami. The 2nd appellant did not allege any bad blood between him and Ligami. His cross examination of Ligami did not suggest such a notion nor did he raise such a defence in his sworn statement. He did not say why he thought Ligami had framed him.

In our view in the circumstances of this appeal, the learned trial magistrate was entitled to accept the evidence of Ligami and his appreciation of the doctrine of recent possession cannot be faulted. It is plain therefore that the 2nd appellant's dock identification by Koech and Salim was buttressed by the finding of Koech's recently stolen mobile phone with him. The failure to mount an identification parade did, not in the circumstances vitiate the 2nd appellant's identification. We therefore reject the 2nd appellant's contention that the learned trial magistrate improperly applied the doctrine of recent possession.

In a related argument, counsel for the 2nd appellant submitted that the learned trial magistrate shifted the burden of proof to the 2nd appellant. In our view that submission is, with respect, without merit. When the learned trial magistrate stated in his judgment that the 2nd appellant had not explained how he had come into possession of the stolen mobile phone, he was merely restating a settled principle that once the prosecution had demonstrated beyond reasonable doubt that the 2nd appellant was found in possession of a recently stolen mobile phone, the onus shifted to him to explain how he had come to possess the mobile phone. Such onus was however not to be discharged beyond reasonable doubt. In the case of ***Hassan -Vs-. Republic [2005]2 KLR 11***, this Court differently constituted, stated:-

"Where an accused person is found in possession of recently stolen property in the absence of any reasonable explanation to account for this possession, a presumption of fact arises that he is either the thief or receiver."

In the appeal before us the 2nd appellant gave no explanation of any kind and the learned trial magistrate was perfectly entitled to take into account the want of explanation in determining the issue of possession of recently stolen property.

The last issue which was raised was that the case against both appellants was not proved beyond reasonable doubt. Our above analysis demonstrates that that cluster of grounds cannot also be sustained. Heavy weather was made of the finding by the ballistics expert, Langat, that some cartridges recovered at the scene could not have been fired using the firearm which was produced at the trial. Various discrepancies were also pointed out by counsel for the appellants. We have already stated that we have concurrent findings of fact by the two courts below on those alleged discrepancies and we cannot interfere unless we are satisfied that there was serious misdirection which led to injustice. We

have found no such misdirection.The finding by Langat that the recovered cartridges could not be fired by the recovered firearm was, in our view, insignificant given that both courts below accepted that a firearm capable of being fired and containing live ammunition capable of being fired, proved beyond reasonable doubt that the attackers were armed with dangerous weapons. With regard to conflict of evidence we have come to the conclusion that the same was not serious as, notwithstanding the same, the case presented by the prosecution remained water-tight.

Our conclusion on the appeals against conviction for the offences of robbery with violence determines the appeals against the convictions on the counts of being in possession of firearm and ammunition respectively. We find no merit in the -same.

The upshot of all the above is that these appeals cannot succeed. We agree with Mr. Abele that both appellants were properly convicted as charged.

The appeals are accordingly dismissed.

Dated and Delivered at Busia this 9th day of May, 2014.

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR