Mukuha & 3 others v Republic (Criminal Appeal 52, 54, 55 & 56 of 2017 (Consolidated)) [2023] KEHC 22894 (KLR) (29 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22894 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CRIMINAL APPEAL 52, 54, 55 & 56 OF 2017 (CONSOLIDATED)

LM NJUGUNA, J

SEPTEMBER 29, 2023

BETWEEN

JOHN GATHAMBO MUKUHA ALIAS NGITI ..... 1ST APPELLANT

GERALD MWANGI KARWENJI ALIAS SUMBUA ..... 2ND APPELLANT

PETER WAWERU NGUGI ALIAS BAROBARO ..... 3RD APPELLANT

FRANCIS NG'ANG'A NYAMBURA ALIAS WACIRU ..... 4TH APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising from the decision of Hon. A.N. Makau (SRM) in the Principal Magistrate's Court at Gichugu Criminal Case No. 682 of 2015 delivered on 17th July 2017)

JUDGMENT

1. The appellants jointly faced 2 charges of robbery with violence contrary to Section 296(2) of the *Penal Code*. The particulars for the 1st count are that on the night of 28th and 29th September 2015, at Kiamugumo Girls Secondary School, Ngariama Location in Kirinyaga East subcounty within Kirinyaga County, the 4 appellants, jointly with others not before this court and while armed with dangerous weapons namely iron bars, robbed Dominic Gachoki Kori of three HP computers, one plasma Samsung TV 51", one Sony projector, cash Kshs. 45,000/= and a mobile phone make Nokia 1110 IMEI number 353970017884567, all valued at Kshs. 230,000/= and at or immediately before or immediately after the time of such robbery, killed the said Dominic Gachoki Kori.

2. On count 1, the 1st and 4th appellants faced an alternative charge of handling stolen goods contrary to section 322(1) and (2) of the *Penal Code*. Particulars of the alternative counts were that on 14th October 2015 at Kariobangi South within Nairobi County, otherwise than in the course of stealing, the 1st appellant dishonestly received and retained Nokia 1110 IMEI number 353970017884567 knowing or

having reason to believe it to be stolen property. Also, that on 22nd November 2015 at Gitwe village, Miharati Location in Nyandarua County, otherwise than in the course of stealing, the 4th appellant dishonestly received or retained a Samsung Plasma TV 51" s/no COZ63DCF500530E knowing or having reason to believe it to be stolen property.

3. The particulars of the 2nd count are that on the night of 28th and 29th September 2015, at Kiamugumo Girls Secondary School, Ngariama Location in Kirinyaga East subcounty within Kirinyaga County, the 4 appellants, jointly with others not before this court and while armed with dangerous weapons namely iron bars, robbed Samuel Njagi Ethan of three HP computers, one plasma Samsung TV 51", one Sony projector, cash Kshs. 45,000/= and a mobile phone make Nokia 1110 IMEI number 353970017884567, all valued at Kshs. 230,000/= and at or immediately before or immediately after the time of such robbery, killed the said Samuel Njagi Ethan.

4. After the hearing, the court found all the appellants guilty of both counts and sentenced them appropriately. Being dissatisfied with the decision of the trial court, the appellants have brought this appeal seeking orders that the convictions be quashed, sentence be set aside and they be set at liberty. The common grounds of appeal are that the learned magistrate erred in law and fact by:

    a. Basing the conviction on contradictory mobile network providers data;

    b. Relying on the findings of a shoddy investigation by the prosecution who failed to prove their case beyond reasonable doubt;

    c. Basing the judgment on circumstantial evidence that was misleading;

    d. Entertaining extraneous matters that had no value in evidence thereby leading to the wrong findings;

    e. Misdirecting herself and sustaining a conviction based on insufficient evidence riddled with doubts;

    f. Disregarding the defense by the appellants;

    g. Failing to recognize the discrepancies in the prosecution's evidence;

    h. Failing to realize that some key witnesses were not called to testify; and

    i. Failing to consider that the charge sheet was defective.

5. At the trial, PW1 was Rose Wanjiru Njogu who was the headteacher of Kiamugumo Girls High School stated that on 28th September 2015 she was in her house within the school compound when she received a phone call at around 4:30am. That at the same time, she heard a knock on her door and it was 2 watchmen and the school cook who informed her that her office and the bursar's office were open but the lights were off. That she went to check on the office in the company of 3 students and they confirmed that it had been broken into. That she alerted the area chief, the TSC office and the OCS Kianyaga Police Station who went to the school and verified the breakage. That she confirmed to them that three computers, a television set, projector a watchman's phone and ksh. 45,000/= had been stolen and that 2 watchmen died in the process. She produced purchase receipts for all the items stolen. That she recorded her statement with police. On cross examination, she confirmed that the watchmen who died were not locked inside the office and that the office was dusted for fingerprints.

6. PW2, Loise Wanjiru Ngure was a student at the school at the time of the incident. She stated that on the night of the incident, she was in the company of another student going to the kitchen at around 4:00am to fetch hot water for showering when they noticed that the kitchen was locked but the principal's,

bursar's and secretary's offices were open and papers were strewn all over the floors. That they retreated back to the dormitory and informed the head girl. That later on, police visited the school and she recorded her statement. On cross-examination, she stated that it is not true that she and her friend had planned to steal from the school. That at the time of the incident, it was only the form 4 students that were on the school compound.

7. PW3, Gladys Njoki Mbuchu was a former student at the school at the time of the incident. She stated that on the material night, she was in the company of PW2 at around 4.00am and they went to the kitchen to fetch hot water for bathing. That they noticed lights in the administration block and the kitchen were off and that the offices of the principal, bursar and secretary were open. That they moved closer and confirmed that indeed they were open. That they went and informed the school captain and the principal. That later, police came to the school and she also recorded her statement.

8. PW4, Ephantus Njeru, who was a school cook at the time of the incident stated that on the material night at around 3:50am he had reported for duty but noticed that the lights in the administration block were off. That he called the watchmen manning the administration block but none of them responded. That he called another watchman in whose company they went to the principal's house because she had not picked the phone. That they returned with her to the administration block and confirmed that the offices had been broken into. That he went back to his duties and later, he recorded his statement with the police.

9. PW5, Elias Kinyua Njogu was also a watchman at the school when the incident occurred. He narrated that on the morning of 29th September 2015, he was the designated watchman at the teacher's quarters of the school. That PW4 had come over to tell him that the doors of the offices were open, the lights were off and that watchmen assigned to the administration block were not responding to the phone calls. That he told PW4 that it was important that the principal be informed of this at once. That they proceeded to the house of the principal and she instructed them to awaken the teachers who joined them in doing rounds in the school compound. That the bodies of the two watchmen were found, one next to the offices and the other next to the school bus. That later when the police arrived, he recorded his statement.

10. PW6, Sophia Wangui Gachoki, the widow of Dominic Gachoki Kari stated that she received a call on 29th September 2015 at around 5:00am from "Mama Masa" asking her if she had heard about the watchmen who had been killed at the school. She rushed to the caller's house and they went to the school. That the area chief confirmed the news that her (PW6's) husband had died. That she fell unconscious until about 9:00am. That the postmortem showed that he had suffered injuries to the head. That she recorded her statement with CID and identified her husband's phone, which she knew to be his as she was familiar with it. On cross-examination, she stated that she could not produce a receipt for the phone but she saw her husband using it before he died.

11. PW7, Cicily Wangeci Njagi who is the widow of Samuel Njagi Ethan stated that she was called by Agnes Wamuyu who told her that something had happened at PW7's husband's place of work. That she called her neighbor who accompanied her to the school where she learned of the demise of her husband. That they started funeral arrangements and he was buried.

12. PW8, Cpl. Daniel Hamisi of Safaricom Law Enforcement Liaison at Safaricom Headquarters stated that he had received several requests from the DCIO Kirinyaga East to assist in investigating a robbery with violence case. That he produced the records requested for between the dates 24th September 2015 to 29th October 2015. He confirmed the geographical movement of the various phones belonging to the appellants as well as the stolen phone and whose sim cards activated the phones. He produced the official reports for the 1st 2nd and 3rd appellant's sim card activations as exhibits. On cross examination,

he confirmed that according to international standards of data recording, there are additional digits usually added after the unique number of the various IMEI numbers. He explained that it is not an inconsistency but rather, a way of compliance to international codes for mobile codes. That in this case, the "0" at the end is not an inconsistency but rather an international code identification marker. That geographical location of an IMEI is dependent on many factors and is guided by the network boosters.

13. PW9, Dr. Ndirangu Karomo conducted post-mortem on bodies of both deceased persons. His findings were that the cause of death was cardiopulmonary arrest secondary to severe head injury. That they both suffered trauma to the head. He produced both death certificates as exhibits.

14. PW10, P.C. Murimi Mosabi who is a crime scene expert stated that on 29th September 2015 he received a call from P.C. Mwalabu asking him to visit the crime scene at the school. That he visited the school and established that there had been a robbery, some items were stolen and, in the process, the 2 watchmen were killed. That he took 25 photographs which he produced as exhibits. On cross examination he stated that even though it is part of his job to take fingerprints, he did not take any fingerprints because the surfaces were rough.

15. PW11, Vincent Mabu, a security Liaison Officer at Airtel Network, stated that he received 3 requests from DCIO Kirinyaga East about the history of the specified subscriber's IMEI. That the number belonged to one George Munenge. He produced the detailed records of the sim card and IMEI between the dates 28th to 29th September 2015. On cross-examination, he stated that he only gave records for the period requested and he could not give information for a period not requested for.

16. PW12, PC Martin Mwalavu the investigating officer at DCI stated that upon request from the DCIO, he visited the school where a robbery had taken place and, in the process, 2 people had been killed. That he ascertained the items that had been stolen and the dead bodies were taken to Kibugi Funeral Home. That the family of Dominic Koori did not have the IMEI number of the phone and so they wrote to the Safaricom Liaison officer asking for this information. That they also requested for the phone records from 29th September 2015 to 23rd October 2015. That the record showed that the stolen phone had been used by the 1st appellant 2 days after the incident and also by a second person called Martin Wambugu Muturi. That his investigation led him to 8 phone numbers, one of them registered to the 3rd appellant. That they also got call records from Airtel Network and verified that before the phone of Dominic Koori was switched off, his colleague had called him and by that time the phone's location was Embu bus Park.

17. That the 1st and 3rd accused persons were arrested at Kariobangi in Nairobi using one of the frequent callers as bait and their 2 phones and sim cards were confiscated. That the 1st and 3rd appellants led them to Martin Wambugu Muturi who allegedly bought the stolen phone from the 1st appellant. That all the suspects were brought to Kianyaga Police Station. That Martin Wambugu has never testified and a warrant of arrest was issued against him. That the 1st and 3rd appellants told the police that the vehicle belonging to the 4th appellant was the one used when they executed the crime. The 4th appellant was arrested in Nyandarua County and was positively identified by the 3rd appellant. That they searched his house and found the stolen television set and they confirmed the details from the information that had been given by PW1.

18. That they also found the motor vehicle in the home of the 4th appellant and upon search, they found a metal cutter, three metal bars and an Airtel sim card. That the 4th appellant led the investigating officer to Kahawa West where they recovered two phones that were activated with the Airtel sim card. That the 4th appellant helped them arrest the 2nd appellant after setting a trap for him in Kahawa West. That 2 other accomplices are still at large. That he wrote to Orange Telecommunications network and

ascertained that the sim card held by the 2nd appellant had indeed been registered in his name but had since been re-issued to another subscriber. That the call records relied on showed them the frequent callers and geographical locations where the calls were made or received and the 4 accused persons called each other frequently. That all the suspects confirmed that they were not from Kirinyaga but the 4th appellant carried them in his vehicle from Nairobi to the school to carry out the robbery.

19. The court was invited to Kianyaga Police Station where the honourable magistrate noted that the metal cutter and bars were placed in a hole on the back seat of the said motor vehicle. That the motor vehicle records showed that it was registered in the name of the wife of the appellant but he was the one driving it when he was arrested.

20. On cross examination by the 1st accused, PW12 stated that it was the 1st appellant who was found with the deceased's phone and had used it shortly after leaving the crime scene, according to the records provided by mobile service providers. That the phone itself was recovered from Martin Wambugu Muturi who refused to testify but had assisted in identifying the 1st appellant. That though there was no sale agreement for the phone, the person who had the phone was living with the 1st appellant at his house in Kariobangi and they were acquaintances.

21. On cross examination by the 2nd appellant, PW12 stated that the 2nd appellant had been implicated by the 4th appellant. That Airtel network phone records showed that he had been in constant communication with the 3rd and 4th appellants. That he was arrested when the 4th appellant called him to meet up at Kahawa West.

22. On cross-examination by counsel for the 3rd and 4th appellants, he stated that none of the phones recovered belonged to the 4th appellant but the telecommunication information led them to him. That the TV set was recovered from the 4th appellant's home in Kipipiri and the motor vehicle he used in the crime was registered to his wife. That he recorded details of the recovered goods in an inventory kept during investigations, even though the serial number of the TV is not captured in the charge sheet. That he did not take photographs of the 4th appellant's home where the TV set was recovered.

23. At the close of the prosecution's case, all the appellants were put to their defenses and each of them gave sworn statements and did not call any witnesses.

24. The 1st appellant stated that on 28th September 2015 he was at his usual job as a turnboy for a food transportation lorry. That they had gone with the driver of the lorry to Njambini to collect a consignment and deliver it at Korogocho market. That soon after, they were called to collect another consignment from Nembure, Embu County to be delivered at the same market. That on the way to Embu and back, their lorry had mechanical problems which were fixed. That at the end of the day, he was sitting in a bar in Karibangi when he got arrested by the police who took him alongside other people to various police stations around Nairobi and eventually to Kianyaga Police Station in Kirinyaga County. That one Martin Wambugu alleged that he had sold him a phone, but the said Martin Wambugu was released. That he was arrested for a crime he did not commit and has been incarcerated ever since the arrest.

25. On cross examination, the 1st appellant stated that he and the lorry driver working with him left Nairobi for Embu on the 28th September 2015 at around 3:30PM but due to the vehicle's mechanical problems, they got to Embu at 11:30PM. That they collected the banana consignment from the home of a person he did not know but the driver knew the owner of the homestead. That they left Embu at around 5AM and again the vehicle developed mechanical problems. That Martin Wambugu had borrowed Kshs. 500/= from him and had given him the phone as collateral and when the money was repaid, the 1st appellant returned the phone to him on 14th October 2015.

26. The 2nd appellant in his defense stated that he was working in Kariobangi at a friend's car wash. That on 23rd November 2015 he received a phone call from the 4th appellant who asked him to meet him at Githurai 44. That he went quickly and upon arrival, he was arrested and they went to Kianyaga Police Station using the 4th appellant's motor vehicle which he was familiar with. That he was arraigned and charged with the offence in the charge sheet. On cross examination he stated that he had been in communication with the 1st and 4th appellants for a long time and that he had been framed for the offence.

27. The 3rd appellant stated that he was a businessman dealing in plastic items. That on 28th September 2015, he received an order for deliveries to Makutano, Kutus and Mwea and he packed the goods at around 3PM. That he dropped off the goods with his driver and turnboy. That to avoid driving back to Nairobi with an empty lorry, they collected bananas at Ngurubani to be dropped off at korogocho market. That they left for Nairobi between 4AM and 5AM. That he returned to his business and later, while at a bar in Kariobangi, his wife went in and pointed at him and the police arrested him. That the police took him and 8 other people to different police stations and homesteads and some items were recovered.

28. That the TV set was recovered at the home of one Samuel Ngugi in Limuru. That eventually, they were taken to Kianyaga Police station and later he was arraigned alongside the 3 other appellants. That the other people were set free, some after paying some money to the police. He stated that he had been framed and he knew nothing about the offence. On cross examination he stated that he knew the 1st accused who was a loader and they communicated from time to time. That when they were collecting bananas to take to the market in Nairobi, he does not recall if the places stated in the Safaricom Liason's report are some of the areas where they collected bananas.

29. The 4th appellant stated that he was framed for the charges. That he was arrested on 22nd November 2015 at his home in Miharati. That one Samuel Ngugi Kabiru called to ask about a land transaction they had been planning to do. That they arranged for a meet-up in Miharati town where the said Samuel arrived in the company of police officers. That the police officers put the 4th appellant in the boot of his car and asked his children for direction to their home. That they searched his house but did not find anything. That the police officers told him to call the 2nd appellant and lie to him that his wife was sick and he needed help. That the 2nd appellant was arrested. That the police officers asked for Kshs. 200,000/= from the 4th appellant or else they link him to the stolen television. That later on, Samuel Ngugi was released and the stolen items were recorded as having been found at the 4th appellant's house. On cross examination, he stated that he knew the 2nd accused person who used to wash his car. That Samuel Ngugi was the owner of a garage in Ngara and they had known each other for 6 years. That when he called the 4th appellant about the land, it was not alarming. That he signed the inventory because he was forced to do so under threat that they would suffocate him with a plastic bag if he didn't.

30. In this appeal, the court directed the parties to file their written submissions and they all complied.

31. In his submissions, the 1st appellant submitted that the trial court erred in insisting that the final submissions be written and on this he cited the case of *Akhuya v Republic* (2003) eKLR and sections 213 and 310 of the *Criminal Procedure Code*. He stated that this was a fatal flaw in the process and that the court must acquit the appellant on this basis. That in the case of *Henry Odhiambo Otieno v Republic* CA Criminal Appeal No. 83 of 2005 (Kisumu) the court held that where written submissions are tendered without the consent of the accused, then the court proceedings become null and void. He also cited the *Judiciary Criminal procedure Bench Book* of 2018 and the case of *John Mugisha v Republic*

(2013) eKLR. That the trial magistrate failed to inform the appellant of his right under section 200(3) of the *Criminal Procedure Code* on the right of an accused person to recall a witness.

32. It was also his submission that the evidence was purely circumstantial and uncorroborated. That the appellant was arrested 2 months later while driving the motor vehicle used in the crime yet that was not enough proof that he was at the scene of the crime. On the reliance on circumstantial evidence, he relied on the cases of *GMI v Republic* (2013) eKLR, *Sawe v Republic* (2002) eKLR and *R. v Kipkering Arap Koske & Another*, 16 EACA 135. That suspicion is not enough to sustain a conviction according to the case of *Mary Wanjiku v Republic* Criminal Appeal No. 17 of 1998 (unreported). That the court should consider the evidence adduced and satisfy itself on whether the main counts or the alternative counts have been satisfied, and that if there is doubt as to which offence is proven to standard, then the circumstantial evidence must be applied as the guiding light. The 1st appellant stated that cell tower information was not enough and/or therefore reliable to place the appellants at the scene of the crime and lead to a conviction.

33. The 2nd appellant submitted in the same terms as the 1st appellant and added that in as much as the prosecution tried to persuade the court that the appellant had confessed, this was not the case per sections 25-32 of the *Evidence Act* and The *Evidence (out of court confessions) Rules*. He decried the accuracy of the evidence on phone records and added that the same does not place the appellants as the exact crime scene.

34. The 3rd and 4th appellants submitted on the same issues and in the same terms as the 1st and 2nd appellants.

35. The respondent submitted that the evidence adduced in its case was watertight and that inconsistencies, if any, do not affect the substance of the case. On this they relied on the case of *Dickson Nsamba Shapwata & Another v Republic* Cr. Appeal No. 92 of 2007. That the offenders were armed with dangerous weapons which were used to kill the 2 watchmen on the fateful night, according to the testimony of PW9. That the prosecution was able to satisfy the requirements of the offence of robbery with violence, which must be considered disjunctively and not conjunctively, as was stated in the case of *Republic v Dima Denge & Others* (2013) eKLR. That the fact that the offenders were armed is enough to prove the offence according to the case of *Johana Ndungu v Republic* (1996) eKLR. That the telephone evidence produced positively identifies the appellants as the offenders and therefore assisted in recovering the lost items.

36. From all the grounds of appeal, in my view, the issues for determination are as follows;

    i. Whether the trial court relied on circumstantial evidence and whether the same was sufficient to sustain a conviction;

    ii. Whether the offence was proved beyond reasonable doubt;

    iii. Whether the evidence was contradictory;

    iv. Whether section 200 of the *Criminal Procedure Code* was violated by the trial court; and

    v. Whether the court considered the appellants' defenses.

37. The decision of the trial court in this case largely rests on circumstantial evidence as there were no eye witnesses to the crime. The courts have formed solid jurisprudence on the application of circumstantial

evidence. In the case of *Abanga alias Onyango v. Republic* CR. App No. 32 of 1990(UR) the court laid down factors to be considered where it must use circumstantial evidence. It was held:

> " It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i)the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

38. Similarly, in the case of *Sawe v Republic* [2003] KLR 364, the Court of Appeal stated that:

> " In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remains with the prosecution. It is a burden which never shifts to the party accused."

39. Additionally, In the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, the Supreme Court had this to say on circumstantial evidence:

> " However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21:
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> > 'It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.'"

40. With this in mind, the testimony of PW12 went a long way in establishing how the various appellants were arrested and some of the stolen goods recovered. Basically, one person led the investigation to the other and so on, until the suspects were arrested. It has been consistently stated that there were certain people who were arrested but were released. However, the 4 who were arraigned faced the charges. PW8 and PW11 stated that the phone that was lost at the crime scene was used as the starting point to track the movement of the appellants and their accomplices.

41. PW8 especially testified how they identified the various sim cards that activated the stolen handset. This tracking led the police in creating a chain of events in the case and they found out that the 1st, 2nd and 3rd appellants were in communication with one another. The testimony by PW11 was that the Airtel sim card had been activated at the home of the 4th accused person but this was not challenged by the defense counsel. Further evidence showed that even though none of the appellants were residents of Kirinyaga County, they were all placed within the area of the crime scene on the night of the incident.

42. With the evidence placed before the trial court, the honorable magistrate went on to explain at length, reasons why she believed that the appellants were at the crime scene on the night of the incident. PW1, PW2, PW3, PW4 and PW5 all confirmed that indeed the school had been invaded and some items were stolen. The evidence of PW8 and PW11 corroborated the evidence of PW12. In essence, starting with the phone activity recorded from the stolen phone which was found in the custody of the 1st appellant, all the other appellants were linked to the offence and to the crime scene. This alone is sufficient proof that one of the elements of the offence has been satisfied and therefore sufficient to sustain a conviction.

43. On the related issue of whether the offence was proved beyond reasonable doubt, I wish to discuss the elements of the crime itself as provided for under section 296(2) of the *Penal Code*. It provides:

> "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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

44. In the case of *Charles Mwai Kimani v Republic* [2022] eKLR the court cited the case of *Jeremiah Oloo Odira v Republic* [2018] eKLR where the Learned Judge encapsulated the aforementioned sections and elaborated on the offence of robbery with violence as follows:

> "Robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto. Two things must therefore be proved for the offence of robbery to be established: Theft and the use of or threat to use actual violence.
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> On the other hand, the offence of robbery with violence is committed when robbery is proved and further if any one of the following three ingredients are established: -
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> i. The offender is armed with any dangerous or offensive weapon or instrument, or
>
> ii. The offender is in the company of one or more other person or persons, or
>
> iii. The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person"

45. The three elements are to be considered disjunctively and not conjunctively hence use of the word "or" in order to satisfy the standard of proof. This was the position of the court in the case of *Republic v Dima Denge & Others* (2013) eKLR (*supra*) where the court stated:

> "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. This was considered at length by this Court in *Johana Ndungu v Republic* Criminal Appeal No. 116 of 1995 (unreported;)
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> > "In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with section 295 of the *Penal Code*. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or properly at

> or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in section 296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section.""

46. Given the affirmation of the evidence linking the appellants to the crime, it is not in question that they were in each other's company (together with others not arraigned) during commission of the offence. Their common goal was to steal, and in the process killed the two watchmen. It is unfortunate that the watchmen succumbed to the injuries but this is proof of actual violence in the process of the theft. Upon recovery of the vehicle used during the incident, PW12 led the court to the police station where the objects used in the crime were hidden in the vehicle. They were metal bars and a metal cutter. PW12 also stated that he interrogated the appellants and established that the 4th appellant drove them from Nairobi to the scene of the crime. This fact was not disputed at the trial. In her judgment, the trial magistrate labored to accurately explain why the crime was proved beyond reasonable doubt starting with the elements as set out in the law and in jurisprudence. I do find her analysis to be satisfactory and that the crime was proved beyond reasonable doubt.

47. On the question of whether the evidence was contradictory, we must consider what the appellants found to be contradictory and or faulty. First of all the appellants submitted that the charge sheet was defective by implying in the particulars that the stolen items belonged to the deceased watchmen, thereby failing to identify the actual complainant. This is surely a grammatical error in reporting of the incident. However, we must ask ourselves what the effect of such an error would be. Is this error likely to impede justice? Or, does this kind of error make the charge sheet fatally defective? The answer to both questions is no.

48. When the charges were read to each of the appellants, they understood the charges and took a plea. Also, the appellants conclusively participated in the trial and even cross-examined prosecution witnesses whenever necessary. Therefore, I do not think that the charge sheet was fatally defective as it communicated the offences sufficiently. In the case of *MG v Republic* (Criminal Appeal E051 of 2021) [2022] KEHC 14454 (KLR), the court was guided by Court of Appeal decisions in the case of *Benard Ombuna v Republic* (2019) eKLR where it was held:-

> " In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence.....Applying the test above, the appellant participated in his trial in a manner to suggest he understood the charge. He cross examined the witnesses well and was able to put an appropriate defence. This is an indication that the appellant understood the particulars of the charge he faced. Further, the appellant did not at the first instance raise an objection or rather contend that the charge sheet was defective. He in the circumstances cannot be said to have been prejudiced. It is noteworthy that an unlawful act cannot cease to be so through the omission of the word 'unlawfully' in the charge sheet. This ground therefore fails."

49. Regarding inconsistencies in the evidence, I have already established that the trial court relied on circumstantial evidence. As indicated earlier, such evidence only passes the test of application if it forms a formidable chain of events. See *Abanga alias Onyango v Republic* CR. App NO. 32 of 1990(UR) (*supra*). As to whether the said evidence was inconsistent and contradictory, it is paramount that the court establish the seriousness of the inconsistencies and whether or not they will affect the core of the

case. In as much as the evidence herein was circumstantial, the same was not contradictory to an extent of making it unreliable. In the case of *Erick Onyango Ondeng' v Republic* [2014] eKLR the Court of Appeal cited with authority the Ugandan case of *Twehangane Alfred v Uganda*, Crim. App. No 139 of 2001, [2003] UGCA, 6 where it was held:

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

50. The appellants submitted that they were denied their right under section 200(3) of the *Criminal Procedure Code*. This section provides:

> "Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right."

51. This section envisions a scenario where an accused person can and/or should demand the recalling of a witness but the succeeding magistrate is bound to inform the accused persons of this right. According to the proceedings of the trial court on 01st July 2016, counsel for the 3rd and 4th appellants stated that the matter was part-heard and submitted that the matter proceed from where it had stopped before the former attending magistrate. The prosecution stated that 7 witnesses had testified and 5 were remaining. Hon. Makau stated that the matter will proceed from where it had reached before Hon. Onkoba. I do note that the 1st and 2nd appellants were present in court when the court directed as such, but none of them raised an objection. In light of this, I do not think that the appellants' rights under Section 200(3) of the *Criminal Procedure Code* were denied.

52. The appellants decried the fact that critical witnesses were not called to testify. On this argument it must be understood that the prosecution enjoys the liberty of arranging its witnesses howsoever it deems fit. In lining up its witnesses, the prosecution is presumed to be satisfied that the witnesses called will meet the standard of proof in the case. It is not for the court, in any way, to concern itself on whether the witnesses were crucial to the case or not. Instead, the court is tasked with considering only the evidence presented before it and making a determination. In the case of *Bukenya v Uganda*, (1972) E.A 549 it was held:-

> "It is well established that the Director has a discretion to decide who the material witnesses are and whom to call, but this needs to be qualified in three ways. Firstly, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the court itself has not merely the right, but also the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence that is inadequate and it appears that there were others witnesses who were not called, the court is entitled, under the general rule of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case. If they had disappeared, the prosecution could easily have called evidence to show that reasonably exhaustive enquiries had been made to trace them without success..."

53. Further, in the case of *Mwangi v R* (1984) KLR 595 the court stated thus:

> " Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive."

54. While on the same issue, the appellants stated that their defenses were not considered by the trial court. At trial, the appellants gave sworn testimonies and did not call any witnesses. In my previous paragraphs, I have endeavored to summarize the testimonies of the defense witnesses from the record of the trial court and it is common that none of them denied being in the area around the school on the night of the incident. the 1st appellant narrated that in the course of business as a turn-boy for a lorry, he was in Embu to collect bananas when their vehicle broke down and they ended up leaving Embu past midnight on the night of the incident, after their vehicle developed mechanical problems. He said that the driver of the lorry would have been the only one to corroborate his testimony but he was not called as a witness.

55. The 2nd appellant did not give an account of his whereabouts on the night of the incident. He narrated how he was arrested in November 2015 and how he was linked with the incident. The 3rd appellant said that on the night of the incident he was delivering goods at Makutano, Ngurubani, Kutus and other areas around the school and that after this he returned to Nairobi in the wee hours of the morning of 29th September 2015. The 4th appellant narrated how he was accosted by police in connection with the incident at the said school and on allegation that his vehicle had been used in the crime.

56. I have read the judgment of the trial magistrate and note that the testimonies of all the appellants at trial were considered alongside all the other evidence and led the court to make its determination. In this judgment, I have also re-evaluated the defenses of the appellants at trial and in my view, they did not raise reasonable doubt. On the one hand, it is the role of the prosecution to prove its case beyond reasonable doubt in criminal cases. On the other hand, the role of the defense is to punch holes in the prosecution's case in such a way that reasonable doubt is created in the mind of the court as to the guilt of the accused person. In the case of *Pius Arap Maina* v Republic (2013) eKLR, the court noted that;

> " It is gainsaid that the prosecution must prove a criminal charge beyond reasonable doubt. As a corollary, any evidential gaps in the prosecution's case raising material doubts must be in favour of the accused."

57. The learned trial magistrate found that the prosecution had proved its case beyond reasonable doubt. In my view, the appellants' defences could not stand in the face of the strong evidence that was adduced by the prosecution witnesses.

58. In the end, having considered the memorandii of appeals and the submissions herein, and the relevant caselaw, I find that the appeals are devoid of merits and are hereby dismissed.

59. It is so ordered.

DELIVERED, DATED AND SIGNED AT KERUGOYA THIS 29TH DAY OF SEPTEMBER, 2023.

L. NJUGUNA

JUDGE

.....for the Appellants

.....for the Respondent