



**Mwaniki & 2 others v Republic (Criminal Appeal E008, E009 & E010 of 2022
(Consolidated)) [2023] KEHC 24663 (KLR) (30 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24663 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E008, E009 & E010 OF 2022 (CONSOLIDATED)**

**FROO OLEL, J
OCTOBER 30, 2023**

BETWEEN

SAMWUEL MATHENGE MWANIKI 1ST APPELLANT

SIMEON MWANGI NGUYAI 2ND APPELLANT

ROBERT MURIEGI MUREITHI 3RD APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

A. Introduction

1. This appeal arises from the conviction and sentencing of the appellants by Hon. K Bidali (CM) in Naivasha CMCN No. 1575/2015 where he sentenced the appellants to suffer death by hanging having found them guilty of the offence of robbery with violence. The sentence with respect to other counts where they had been found guilty was held in abeyance.
2. In the primary suit, the 1st appellant was the 4th accused, the 2nd appellant was the 1st accused person, while the 3rd appellant was the 2nd accused person. Upon conviction all the appellants filed different appeals which were consolidated on 3rd November 2022 and the appeal files No 9 & 10 of 2022 marked as closed.
3. In the primary suit, the appellants were jointly charged together with three other accused persons with five (5) counts of the offence of robbery with violence. Further the 1st appellant was charged with four (4) counts of handling stolen goods and one (1) count of having suspected stolen property. The 3rd and 5th accused in the primary trial absconded trial and were reported to have died, while the 6th accused in the primary trial was acquitted. The offences the appellants were charged with were several, namely;



A.Charge:

Robbery With Violence Contrary To Section 295 As Read With Section 296 (2) Of The Penal Code.

1. Simon Mwangi Nguyai
2. Robert Mwirigi Mureithi Aka Keva
3. Elias Kariithi Gichuki
4. Samwuel Mathenge Mwaniki Aka Sammy Boy
5. Paul Thuita Wachira
6. Antony Ndaiga Wandu

on the night of 6th and 7th August 2015 at Malewa bush ventures camp in Gilgil within Nakuru county jointly with others not before court, while armed with a Pistol and a rifle robbed of Mr Cristopher Edward Campbell Clause of one motor vehicle make Prado registration Numbers KBQ 632P, one Sumsung galaxy trend plus 57580 phone, and one Nokia 3310 all valued at Ksh.2,020,000/= and at the time of such robbery used actual violence to the said Christopher Edward Campbell

B.Alternative Charge: Count 1

Handling Stolen Goods Contrary To Section 322(1),(2) Of The Penal Code.

Samwuel Mathenge Mwaniki Aka Sammy Boy; On the 12th day of August 2015 at Kinoo area of Kiambu County, otherwise than in the course of stealing dishonestly retained one Sumsung galaxy trend plus 57580 phone, knowing or having reason to believe them to be stolen or unlawfully obtained, the property of Christopher Edward Campbell.

C.Count II

Robbery With Violence Contrary To Section 295 As Read With Section 296 (2) Of The Penal Code

1. Simon Mwangi Nguyai
2. Robert Mwirigi Mureithi Aka Keva
3. Elias Kariithi Gichuki
4. Samwuel Mathenge Mwaniki Aka Sammy Boy
5. Paul Thuita Wachira
6. Antony Ndaiga Wandu;

On the night of 6th and 7th August 2015 at Malewa bush ventures camp at Gilgil within Nakuru County jointly with others not before court while armed with a pistol and a rifle robbed one Christine Mary Cambell Clause of cash 2000 US dollars, 900 Starling pounds, Ksh.45,000/=, one apple iPhone 4, one apple iPad, one apple Mc book air, one pair of gold earrings, a necklace of blue lizard, a gold chain, silver bracelet, silver ring, a gold ring, and external hard drive, guitar make SANCHEZ, cooking gas 12.3kg, beige handbag, radio cassette make HITACHI, silver spoons and kitchen utensils, all



valued at Six hundred and sixty three (ksh.663,000) and at the time of such robbery used actual violence to the said Christine Mary Campbell.

D. Alternative Charge Count II

Handling Stolen Goods Contrary To Section 322 (1)(2) Of The Penal Code.

Samwuel Mathenge Aka Sammy Boy; On the 12th day of August 2015 at Kinoo area of Kiambu County, otherwise that in the course of stealing dishonestly retained one apple iPhone4, one apple iPad one apple mc book air, an external hard drive, guitar make SNCHEZ, cooking gas 12.3kg, handbag beige in colour, radio cassette make Hitachi knowing or having reasons to believe them to be stolen or unlawfully obtained, the property of Christine Mary Campbell.

E. COUNT III:

Robbery with violence Contrary to section 295 as read with Section 296 (2) of the Penal Code

1. Simon Mwangi Nguyai
2. Robert Mwirigi Mureithi Aka Keva
3. Elias Kariithi Gichuki
4. Samwuel Mathenge Mwaniki Aka Sammy Boy
5. Paul Thuita Wachira
6. Antony Ndaiga Wandu;

On the night of 6th and 7th August 2015 at Malewa Bush Ventures camp at Gilgil Sub county within Nakuru County jointly with others not before court, while armed with a pistol and a rifle robbed one Sharon Lindi Pape of one motor vehicle make Toyota Prado registration number KBU 345G, cash 20,000/=, 50 sterling pounds, one apple iPhone 6, 4 pairs of golden earrings, two pair of shoes and one Samsung flat screen (big screen television) one red stripped wallet, one Ariston immersion , one PPR pipe welding kit in a yellow metal box, one green plastic crate, two stainless steel dish, cable, one wire drain cleaner, one pair of grips, spanner, earth grey plastic pipes fittings, one waste connector, five white flexible hose, one roll of gypsum fiber tape, five white lighting fitting packed with electrical connection, two bulb holders, six blue and black farm hose fittings, three valves with red taps, one box read drill bit one Makita electric drill, one bosh electric drill, one pair of battery for Makita drill, a half part of blue vice, two sink plug fittings, nine black conduct fittings, two black round electrical conduit boxes, six black double socket backs, four stainless steel taps, one roll of PTFE tape, three brass door handle sets, ten brass doors hinges, one white double electrical sockets box, one black single electrical socket box, one crocodile clip, one metal eyelet, nine metal waste pipe filings, one blue tap spanner, one hammer, two towel rails, one white adapter, one 300w inverter, one Nokia charger, one pink nail varnish, one stainless steel padlock, one handsaw blade, one red external hard drive, one 10mm halford spanner, one 32g bite flash drive, one apple white connector, one white sole mate speaker, four bottles of white wine, two bottles of red wine, one bottle of grant whiskey, one Hanford tool box containing 200 pieces, two leather man knives, one black iPod and one small black torch all valued at Ksh.4,488,000 and at the time of such robbery used actual violence to the said Sharon Lindi Pepe.



E. Alternative Charge Count III:

Handling Stolen Goods Contrary To Section 322(1)(2) Of The Penal Code;

Samuel Mathenge Mwaniki Aka Sammy Boy. On the 12th day of August 2015 at Kinoo area of Kiambu County, otherwise than in the course of stealing dishonestly retained, one apple iPhone, two single pair of shoes and one Samsung flat screen (big screen television) one red stripped wallet, one Ariston immersion heater, one PPR pipe welding kit in a yellow metal box, one green plastic crate, two stainless steel soap dish, cable one wire drain cleaner, one pair of grips, spanner, eight grey plastic pipes fittings, one toilet waste connector, five white flexible hose, one roll of gypsum fiber tape, five white lighting fitting packed with electrical connection, two bulb holders, six blue and black farm hose fittings, three valves with red taps, one box red drill bit one Makita electric drill, one bosh electric drill, one pair of battery, four Mikita drill, half part of blue vice, two sink plug fittings, nine black conduit fittings, two black round electrical conduit boxes, six black double socket backs, four stainless steel taps, one roll of PTFE tape, three brass door handle sets, ten brass doors hinges, one white double electrical sockets box, one black single electrical socket box, one crocodile clip, one metal eyelet, nine metal waste pipe fittings, one blue tap spanner, one hammer, two towel rails, one white adapter, one 300w inverter, one Nokia charger, one pink nail varnish, one stainless steel padlock, one hand saw blade, one red external hard drive, one 10mm, halford spanner, one 32g bite flash drive, one apple white connector, one white sole mate speaker, four bottles of white wine, two bottles of red wine, one bottle of grant whiskey, knowing or having reasons to believe them to be stolen or unlawfully obtained. The property of Sharon Lindi Pape.

F.Count IV:

Robbery With Violence Contrary To Section 295 As Read With Section 296 (2) Of The Penal Code

1. Simon Mwangi Nguyai
2. Robert Mwirigi Mureithi Aka Keva
3. Elias Kariithi Gichuki
4. Samwuel Mathenge Mwaniki Aka Sammy Boy
5. Paul Thuita Wachira
6. Antony Ndaiga Wandu;

On the night of 6th and 7th August 2015 at Malewa bush ventures camp at Gilgil within Nakuru County jointly with others not before court while armed with a pistol and a rifle, robbed one Stephen Kuria off cash Ksh.6,000/= and a Tecno mobile phone all valued at Ksh.9,000/= and at the time of such robbery used actual violence to the said Stephen Kuria.

G.Count V

Robbery With Violence Contrary To Section 295 As Read With Section 296 (2) Of The Penal Code

1. Simon Mwangi Nguyai



2. Robert Mwirigi Mureithi Aka Keva
3. Elias Kariithi Gichuki
4. Samwuel Mathenge Mwaniki Aka Sammy Boy
5. Paul Thuita Wachira
6. Antony Ndaiga Wandu;

On the night of 6th and 7th August 2015 at Malewa bush ventures camp at Gilgil within Nakuru County, jointly with others not before court, while armed with a pistol and a rifle robbed one Keith Bentley of cash Ksh.80,000/=, 60 sterling pounds, 50 euros, one apple mc book pro, one apple macbook air, one apple iPad, two apple iPad minis and one iPad normal, two iPhone 6, one iPhone 6plus, one iPhone 5, one iPhone 4 and one Samsung note 3 phones all valued at Kshs.1,5050,500 and at the time of such robbery used actual violence to the said Keith Bentley.

H. Alternative Charge Count V

Handling Stolen Good Contrary To Section 322(1)(2) Of The Penal Code;

Samuel Mathenge Mwaniki Aka Sammy Boy. On the 12th day of August 2015 at Kinoo area of Kiambu County, otherwise that in the course of stealing dishonestly retained, one apple mc book pro, one apple mac book air, one apple iPad, two apple iPad minis and one iPad normal, two iPhone 6, one iPhone 6 plus, one iPhone 5, one iPhone 4, and one Samsung note 3 knowing or having reasons to believe them to be stolen or unlawfully obtained, the property of Keith Bentley.

I.Count VI:

Having Suspected Stolen Property Contrary To Section 323 Of The Penal Code;

Samwel Mathenge Mwaniki aka Sammy Boy On 12th August 2015 at Kinoo area at Kiambu County having been detained by No.56299 Cpl Francis Singila as a result of the exercise of the powers conferred by Section 26 of the Criminal Procedure Code had in his possession one television make LG ultra s/im fit s/no.LZ2012327, iron box make DIVA, woofer make golden tee and one speaker, home theater make sonny s/no.DAV-DZ340K with one big speaker and small speakers, immersion water heater, DVD make LG, car mp3 player stereo system, amplifier portable wireless make OMAX, reasonably suspected to have been stolen or unlawfully obtained.

4. The appellant's upon conviction did file separate grounds of Appeal, but which raised similar grounds, namely;

The 1st Appellant Grounds of Appeal

- a. That the learned trial Magistrate erred in law and in fact when he relied on the evidence of purported visual identification to convict the appellant but failed to note the circumstances were not conducive for positive identification of assailants owing to the fact that all the perpetrators were all strangers.



- b. That the learned trial Magistrate erred in both law and fact in finding that the identification parades conducted by PW11 were properly procured while there were glaring irregularities and the procedural technicalities were flawed.
- c. That the learned trial magistrate erred in both matters of law and fact by holding that the offence of robbery with violence was proved against the appellant but failed to note the Elements of the offence charged were not proved in evidence.
- d. That the learned trial Magistrate erred in both matters of law and fact by holding that, the applicant was in possession of stolen items, but failed to note that, the appellant had discharged the burden of possession by stating clearly who placed the goods in his custody.
- e. That the appellants defence was not considered.

The 2nd Appellant Grounds of Appeal

- a. That the learned trial Magistrate erred in law and fact when he relied on evidence of visual identification given by a single witness identifying witness PW8 but failed to consider in his chief evidence the witness did not state to have identified the appellant. This omission went to the root of the prosecution evidence.
- b. That the learned trial Magistrate erred in law and fact by holding that the offence of robbery with violence was proved as against the appellant but failed to note that the ELEMENTS of the offence charged was not proved.
- c. That, the learned trial Magistrate erred in law and fact in finding that the identification procedure conducted by PW11 was properly procured while there was glaring irregularities and procedural technicalities were flawed.
- d. That, it was a misdirection for court to hold that, the appellant committed the offence of robbery with violence in counts (i), (ii),(iii) and (v) but failed to note that the circumstances that lead to the arrest of the appellant were not connected to any robbery in fact the circumstantial evidence that led to his arrest did not point to the inference of his guilt.
- e. That the appellants defence was not conclusively considered.

The 3rd Appellants Grounds of Appeal

- a. That, the learned trial Magistrate erred in law and fact when he relied on the evidence of the prosecution witnesses on visual identification but failed to note that in their evidence in chief and their first evidence and initial statement, they did not state to have identified the appellant at the crime scene.
- b. That, the learned trial Magistrate erred in both matters of law and facts in finding the identification parades conducted by PW11 were properly procured while there were glaring irregularities and procedural technicalities were flawed.



- c. That, the learned trial Magistrate erred in both law and facts by holding that the offence of robbery with violence was proved against the appellant but failed to note that the ELEMENTS of the offence were not proved.
- d. That, it was a misdirection for the trial Magistrate to hold that the appellant committed the offence of robbery with violence but failed to note that, the circumstances that lead to his arrest were not connected to the robberies in question.

B. Evidence at Trial

5. PW1 Keithi Bentley recalled that on the night of 06.08.2015, he was at Malewa Bush Ranch at about 8.00pm and had just taken a shower/bath, when two men suddenly entered his room brandishing a rifle and short gun. One was wearing a long trench coat and the other had put on a jacket. They both had scarfs around the neck but he could clearly see their mouth and chin. The said assailants directed him to comply with their orders so as not to get into harm's way and he was led to the kitchen, where he found Christine Campbell, Sharon Olerany, one Kuria the Security guard and Milka the nurse all had already been herded there and were lying on the floor with their hands tied.
6. The assailants took Christine Campbell away to the main house which was 30 meters away and stayed with her there for about 30 minutes. During this period, they had three other robbers watching over them and they kept walking in and out at intervals. They also demanded for cash from them and he told them where he had left his two wallets. One was besides the bed and the other was in the closet. They took him to his bedroom to get his wallets and returned him to the kitchen. In the process they further brought back Christine Campbell and went away with Christopher Campbell and continued ransacking the camp.
7. During the robbery incident there was sufficient light from the house bulbs (electricity) in the room to enable him see clearly. They lost all their phones, money and laptops/computers and when the robbers were leaving they were herded into Christine Campbell Silver Prado and were taken to Langalanga area and ordered to keep quiet. After the robbers had left, they alighted and discovered that the Prado tyres had been punctured. Kuria the security guard managed to get to the police station where he sort for help and eventually they were rescued by the police.
8. Later on PW1 learned that some items were recovered which he identified as MFI 1 to MFI 11. He identified accused 2,3 and 4 (at the trial court) as person who robbed them and whom he saw during the robbery. In cross examination, PW1 reiterated that he was confronted by two men in his room and the assailant who was taller had a rifle. Later in the kitchen he saw that there was another robber who also had a gun (pistol). He did not know how long the robbery incident took and did not have receipts for the exhibit identified, but identified MFI-4 (Ipad) as his. He had turned it on using his password.
9. PW2 Stephen Kuria Kanyita testified that he was a security officer at Malewa Bush Ventures and had worked there for five (5) years. On the night of 5th August 2015, he was on duty and during the following day he was given extra duty at Malewa trust from 3pm to 6pm. The trust was about 3km away and when done he reported on duty at about 6.45pm. He had used his motor bike to go to work and did not closed the gate because he was not aware if his boss had arrived or not. He went to the bush school and put on security lights and decided to go for a call of nature.
10. As he washed his hands and was walking out, he was confronted by someone who was light skinner, wore a black jumper and was holding a G3 pointed at him and warned him against running away. Behind the 1st assailant were three (3) other men who were not talking but one was armed with a pistol.



At the point of confrontation there was enough light and he decided to try his luck and run away, but they gave chase and held him. He was taken to the kitchen where he found his colleague Benson, who had also been captured. They were tied with ropes and one robber who had a pistol stayed back to guard them. After about 10 minutes they were herded into the main house kitchen where he found his employer Christine Campbell, her sister Sharon, her husband Keith and Milka were all under captive and were on the kitchen floor. He proceeded to lay on the floor as directed but looking upward. The robbers started demanding money form Christine, Sharon and Keith and would go with them to the main house to take money from where the captives said they had kept it.

11. One robber sat on Milka and even attempted to rape her but she resisted. At that point his boss Chris Campbell walked in from outside and stumbled upon the ongoing robbery. One of the assailants told him that they had been waiting for him and took him outside. After a while he was returned together with his mother and both were told to lay on the floor and join the others.
12. The robbery incident took a long time and PW2 stated that he was able to identify the robbers clearly. At this point the appellants counsel Mr. Owuor did apply to have the matter adjourned to enable the court visit the locus in quo (scene of the crime). The visit occurred on 27.04.2016 but no further evidence was led by PW2 nor was he cross examined or recalled during the entire proceedings.
13. PW3 Sharon Linda Pape testified that she lived in Malewa near Langalanga in Gilgil. On 06.08.2015 she and her sister Christine Campbell went shopping in Nakuru and came back at around 4pm. They proceeded to visit their mother at Richmount just outside Gilgil and returned to Malewa at about 7.30pm. Once at home they started unpacking their shopping and proceeded to the small kitchen with Christine where they started to prepare supper. At about 8.00pm three (3) men entered the kitchen and introduced themselves as Al-Shabab terrorists. The men were tall and had scarfs over their head. When they came, they had already captured the caretaker 'one mwiraria' and they were all ordered to lie down. After a while they brought in PW2 -Kuria, the nurse Milka and her husband Keith.
14. The robbers proceeded to rob them of their jewelry, gold earrings and iPhone. They also took Ksh.20,000/= which she had. Further the robbers lead Christine Campbell to the main house safe and after a while they brought her back. The robbery incident took about two (2) hours after which they were ordered to enter the boot and back seat of Christine's Prado KBQ 362P. Two of the robbers got into the other motor vehicle KBU 345Q (which was her car) where they had packed stolen electronics as well as building materials (electrical and plumbing equipment). They were driven to a lonely spot on a bumpy road at Kipiriri.
15. Two robbers got off and were outside the motor vehicle for around one hour. They kept on using their phone and were texting. She could see the same as their phone would light up as they were texting. After about an hour they took the car keys and threw it away. They also punctured two back tyres of Motor vehicle KBQ 362P. After they left 'Christopher and Kuria' decided to go look for help and walked along the railway line towards langalanga. PW3 further stated that they were rescued by the police at about 2.15am by which time Christopher and Kuria had not come back.
16. One safely back at Malewa, she discovered that the robbers had ransacked the house and emptied the safe, she lost the TV in her room, a pair of shoes, a purse, bottles of wine and cash Ksh.20,000/= which was in her handbag. After about one week they were informed by the CID that recoveries of some items which had been stolen had been made. She identified the said items as MFI 13 – 24. She did not know any of the robbers and only described them as tall but could not identify any of them. In cross examination PW3 reiterated that she initially saw three robbers who had covered their faces but when leaving in two vehicle she saw others.



17. PW4 Christine Campbell Clause testified that she had been a resident of Malewa for 10 years and was the managing director of Malewa Bush Ventures. On 06.08.2015 she went shopping with PW3 (Sharon) and came back to Malewa later in the evening. She was with PW3 and her husband Chris Campbell Clause. They first off-loaded the food they had bought at the kitchen freezer of the bush school. She called PW2 Kuria but he did not respond, they got back into the car and drove to the main home and continued to offload other items in the main house which was approximately 20 minutes' drive from the school. PW3 went to the kitchen in the main house to start preparing supper, while her husband went to visit his mum, who was in her independent room, attached to the main house.
18. After finishing to unpack she joined PW3 in the kitchen and suddenly three (3) robbers entered the house, they had covered their faces and carried an AK rifle and pistol. They were directed to lie down and their hands were tied with strings. Milka, Keith (her brother in law) Mwiraria (caretaker) and Kuria (watchman) were also later brought in and ordered to lie down. The robbers took her iPhone, earrings, bracelets wedding ring and took her to the main house and directed her to open the safe where from they took 200 dollars and 900 pounds before escorting her back to the kitchen where an armed robber who had a pistol kept guard as others continued to ransack the house.
19. Eventually they were herded into her motor vehicle KBQ 362P Toyota Prado. Sharon, Keith, Chris and herself were placed in the boot while Milka, Benson and Kuria were placed on the back seat. Three robbers squeezed into the front seat of the Prado (two squeezed on the passenger seats while one drove) the robbers also took the other motor vehicle KBU 345U. They were driven for some distance and after sometime the three robbers got out and instructed them not to speak. The said robbers kept on talking on their phones for about one hour and she could see the same as the moon was out and the keypads lights kept on reflecting. After the robbers had left, he husband Chris and PW2 left to go look for help at Langalanga shopping center. After about two (2) hours policemen came, rescue them and escorted them back to Malewa Bush Camp.
20. During the robbery she lost one iPhone, macbook air laptop, iPad, Ksh.45,000/= jewelry and gas cylinder. Some of these items were recovered three (3) days later and at the police station Gilgil she identified her iPad with a blue cover and laptop. The items recovered belonged to her, her husband, sister, and brother in law and all were marked for identification. She further testified that on the night of the robbery, her driver Paul Kariuki had identified a motor cycle rider who was seen carrying three passengers and he suspected that they were the robbers. He knew the motor cycle rider and gave the police his phone number. Motor vehicle KBU345G dark blue land cruiser was never recovered. In cross examination PW4 stated that three robbers entered the house through the kitchen while two were stationed outside and she saw them when getting into the motor vehicle. There was no security light outside as they had not been turned on. The compound was dark.
21. PW5 Benson Marierie Muhindi testified that he was caretaker of Malewa Bush Ventures and had lived there from 1971. His bosses were Christine, Sharon, Keith and Christopher. PW3 and PW4 had earlier in the day gone to Nakuru and came back in the evening. After they came back, they instructed him to pick the key of the freezer at Bush School and proceed to place the meat they had left on top of the freezer, inside the said freezer. He proceeded to the school but before he could leave, he was held by some people. Initially he thought it was PW2 but realized otherwise when they pointed a gun at him. They interrogated him as to how many people were in the main house and tied him up. Shortly thereafter they brought PW2 and they were led to the main house, where they found that Christine, Sharon, Keith and Milka had all been captured and were lying on their stomachs with their hands tied at the back.



22. As the robbers were ransacking the house, Chris entered the kitchen and he too was captured. The robbers entered his room next to the main house and took his phone. The robbery went on for about three hours and later they were bundled into Prado KBQ 662P. The 'whites' were put in the boot while him and Kuria and Milka were put at the back seat. They were abandoned in the bush and the motor vehicle tyres deflected. Chris and Kuria went to look for help and the police came and rescued them. PW5 stated that he lost his phone and Ksh.3,000/=. Later he attended an identification parade conducted at Gilgil police station and he was able to identify the three robbers. During the robbery he was able to see the robbers clearly because there was light inside the kitchen. He identified the 2nd 3rd and 4th accused on the dock. (The 2nd accused is the 3rd appellant and the 4th accused in the 1st appellant herein).
23. Further he was sure with his identification of the 3rd and 4th accused on the dock as they are the ones who took PW4 and went with her to search her room. He reiterated that he had seen them clearly when they picked PW4. In cross examination PW5 stated that he had identified three people. During the robbery, one of the robbers had covered his face with a shawl but the three robbers who were in the house did not cover their faces. The entire robbery incident took about three hours but they were rescued about seven and half hours after the robbery. The 2nd accused (3rd appellant is the one who took his phone).
24. PW5 further testified that the identification parade had about ten people. The 3rd appellant was in the line (6th in the line) and he identified him by touching him and the said parade was conducted in a open space within the police station. Further he identified the 4th accused (1st appellant) in separate identification parade held in the same date. In re-examination the PW5 insisted the three robbers had not covered their face. The 3rd accused and 4th accused (1st appellant) had brought grandmother (Chris's mum) into the room, while he also saw the 2nd accused (3rd appellant) ask PW4 -Christine about exchange rates. He also denied the insinuation that prior to the identification parade, the police had shown him the suspects.
25. PW6 Paul Kariuki Kagwa testified that he was a driver employed by PW4 Christine. On 07.08.2015 at about 1.30am he was called by his colleague at work Leah Wangui, who informed him of the robbery incident which had occurred at their place of work. He reached out to his other colleague Stephen Kariuki, who came and picked him and Leah Wangui with his car. Leah had been with other robbery victims and they were looking for assistance. Stephen Kariuki carried PW8 in his car and they went to go look for help, while him he remained behind with PW2, Leah Wangui, Richard, Waitheria and John.
26. While still at Langa langa he saw a motor cycle coming from Mwera School towards them at high speed. This was about 1.43a.m. As it passed PW2 Kuria suggested that they follow the said motor cycle. They took a motor cycle belong to Richard and chased after the initial motor cycle which had passed. They followed the motor cycle for about 2 ½km along langa langa towards Gilgil road. The motor cycle ahead registration number was KMDF 921T and it had 3 passengers. He recognized its driver, who was Mwangi (2nd appellant). The 2nd appellant asked them if there was any problem but they replied back they did not have any. They continued to follow the said motor cycle until Syndicate junction. The 2nd appellant stopped to drop his passengers. He then walked back to where they were and inquired what the problem was. They told him their boss had been attacked and decided to ask the (2nd appellants) for his phone number, which he gave them. They then decided to return to Langalanga.
27. Later the four (4) policemen came and they went to rescue their bosses in the bushy area where they had been abandoned, which was about 2 kilometers off the main road. The police rescued Milka, Christine, Sharon and Keith and returned them to Malewa. After the 2nd appellant had been arrested he identified him as the person who was riding the motor cycle on the material night. He was a person well known to him as they rode motorcycle (bodaboda) together. In cross examination, PW6 insisted he knew the



- 2nd appellant very well and he lived with his parents near their home. A boda boda rider could pick any passengers but only until certain hours due to their (boda boda) own safety. They had followed the 2nd appellant even when they did not have any problem with him and the 2nd appellant had informed him that he did not know the passengers he was carrying.
28. In further cross examination by counsel for the 2nd – 6th accused. PW6 confirmed that the motor cycle did not have headlights and they were using a passenger's spotlight which he was holding and clearly saw the motor bike ahead that is why he was able to record its registration number. The 2nd appellant had dropped off his two passengers at Syndicate junction. In re-examination PW6 stated that his spotlight had four batteries and he identified the motor cycle as the one normally used by the 2nd appellant.
29. PW7 John Gachukia Macharia testified that he was a business man running taxi business and had employed 2nd appellant as a rider of motor cycle KMDF 921 T, which he used to do boda boda business. On 10.08.2015 he was called and told that the said motor cycle had been detained at the police station. He went and recorded his statement. He had bought the motor cycle from Benson Mwangi for Ksh.75,000/= and identified the sale agreement, logbook and photographs of the motor cycle. The 2nd appellant was his employee and would pay him Ksh300 daily. The motor cycle was detained as it had been used in a robbery. In cross examination by the 2nd appellant, the witness stated that the 2nd appellant was in the best position to know the agreement he had with his clients.
30. PW8 Sam Ngunjiri Mwangi testified that he ran a car hire business and on 09.08.2015 the 1st appellant called him and told him he wanted to hire his car for two days being 10th and 11th August 2015. He leased out motor vehicle KBZ 919J owned by Johnson Njeru Karimi and they signed a contract for car hire and proceeded to release the motor vehicle to the 1st appellant. On 12.08.2015 he could not reach the 1st appellant and he told the owner of the car to switch it off using the car tracker. Afterwards he was called by the police and told the said motor vehicle had been recovered and it had stolen goods. He identified the 1st appellant (4th accused at trial) as the person who hired the said motor vehicle. In cross examination he explained that he took a copy of this national identification card and driving license of the 1st appellant and they had a hand-written contract all of which he identified.
31. PW8 Christopher Edward Campbell testified that on 06.08.2015, they arrived back at their property and first proceeded to Potemas bridge house (school) within their residence and started to offload some of the items they had bought. As they were offloading items off the car, he saw someone move in a nearby building but assumed it was a guard. By then the security lights had been turned on. Once done, they proceeded to the main house and he went to see his mother, who was residing in her own room and left behind PW3 and PW4 in the kitchen as they started to prepare supper. He remained with his mother for 20 minutes or so but was uneasy as there was no movement outside. He went towards the main kitchen and when he entered he noticed that all family members had been tied up and were lying down. The lights were on and apart from family members, Milka, PW2 Kuria and their caretaker Mureria too had been tied. He was accosted from behind by the robbers and was immediately tied up too.
32. He disclosed to the robbers that his mother had remained in her room alone and this prompted one of the robbers to go and bring her. He brought her in while carrying her and proceeding to tie her up. PW8 protested vigorously and asked them to return her to her bed. Initially they refused but eventually they appreciated her condition and took her back to bed. He further revealed that after the robbery incident, his mother never spoke again and passed on. The robber's ransacked the entire house and kept on pointing the guns at them to threaten them to disclose where they had kept money. Eventually the robbers loaded all stolen items in one motor vehicle KBU 345 G and herded them in PW4 motor



- vehicle KBQ 962P Prado. While driving away with the loot, the robbers kept on communicating in Kiswahili and strategizing how to regroup.
33. They were taken to a rough track for about 3 – 4 kilometers off the main road, before the robbers stopped the car. They kept on communicating with the other robbers in the other car and they disagreed on how much cash was taken from PW3. They even came back and asked PW3 how much cash she had in her bag. One robber tried to sexually molest Milka but he told him off. Later the robbers punctured the motor vehicle tyres and went away. He and PW2 decided to go look for help at langa langa and eventually ended up at the house of one of their employee Leah. She called Steven to come rescue them. The police were also alerted and they came to the scene.
 34. The police prepared an inventory of what had been stolen and later the robbers were tracked. During the robbery one of them tried to cover his face using a shawl but the cover would keep falling off. Two of the robbers were tall, one was dark and one was light skinned. The third had a jacket and was very smartly dressed. While the other had a ‘Somali like look’. PW8 further testified that he attended the identification parade at Gilgil police station and identified the suspects separately. He identified the 4th and 6th accused (the 4th accused being the 1st appellant herein). He also identified the 2nd accused (3rd appellant) due to his facial factors and he was wearing the same boots. Most of the items recovered belonged to PW1 Keith, PW3 Sharon and PW4 Christine.
 35. In cross examination PW8 stated that there was some distance between his mother’s house and the kitchen and while the robbers tried to cover their face it was not continuous. He could see their faces and they had been held for 3-4 hours in the kitchen where there was light. The 4th accused (1st appellant) was wearing dockers boots during the parade and he wore similar boots during the robbery. He further clarified that he never saw the suspects prior to the identification parade at the police station. PW8 in re-examination restated that three robbers never attempted to cover their faces and he did not have any advance hint on who to identify at the parade.
 36. PW9 Peter Kanyuko Kirui testified that he was ‘Leah’s’ landlord. On 07.08.2015 at about 1.00am he heard people calling out Leah and knocking his gate. He put on the security lights and went outside. He found PW2 Kuria and PW8 Chris who told him they had been attacked and needed help. He woke up his neighbor’s and mobilized for help, he also called Gilgil police station and informed them of what had transpired. While outside his residence they saw a motorbike rider with two passengers. One Kariuki, Wachira and Richard followed the said motor cycle and later told him that they had recognize it rider Mwangi (2nd appellant) whom he did not know but he later learnt that he was arrested.
 37. PW10 Meshack Wachira Karanja too testified that he was PW9 neighbour. On 07.08.2015, PW9 called him and told him there was a robbery in progress. He went outside his house and met Peter, Leah, Wangui and PW2 Kuria. PW2 Stephen Kuria told them of what transpired and they had come to seek help in langa langa while still outside their residential they saw a motorcycle approaching carrying three people. The rider and two passengers and he did not recognize them as they drove by. The decided to follow them and using Richard motorbike. It was himself, Kariuki and Ngige. They followed the motorcycle until Gilgil town and Richard identified the rider. They tried searching for the other passengers who had alighted but did not find them.
 38. PW11 Chief Inspector Simon Kirui testified that he was the OCS Gilgil police station as at 06.08.2015 when the robbery incident was reported. He was called by PW9 Peter Kirori and informed that a robbery incident had occurred in Langalanga Malewa Bush Ventures, where a gang of five (5) robbers had attacked and robbed the residents therein. He went to Langalanga where he met PW2 Kuria who in turn lead him to where motor vehicle KBQ 362P Toyota Prado had been abandoned and they



- proceeded to rescue the victims of the robbery and took them back to Malewa. He called the scene of crime officers who came and took photographs of the scene.
39. While at the scene of crime, other people joined them from Langalanga including the 2nd appellant. PW2 Kuria and PW 9 Peter identified him as the one who rode the motor cycle which carried the robbers. He did arrest the 2nd appellant and took him to Gilgil police station and on interrogation he confessed that one on the passengers he carried was 'Kevo' who lived in Langalanga and they had called him after the robbery. Later the 3rd appellant (alias Kevo) and Elias Kariithi Gachika were arrested on 11.08.2015 while the 1st appellant was arrested on 12.08.2015.
40. PW11 did conduct identification parade for all the accused persons while observing all the parameters as provided for under the police standing orders;
- a. For the 3rd appellant he was identified by Benson Mwereria while standing between the 3rd and 4th person in the line, while Milka identified him while he was standing between the 3rd and 4th persons therein. He consented to the parade being undertaken and the parade forms were produced as Exhibit 43.
 - b. For the 1st appellant he agreed to participate in the identification parade and signed the parade forms. He was identified by Steven Kuria, Benson Mwereria and Milka Nyawira. The parade forms were produced as Exhibit 44
 - c. On 12.08.2015 he did an identification parade for the 2nd appellant who agreed to participate in the same. Benson Mwereria and Milka Nyawira did not identify him.
 - d. On 15.08.2015 PW11 conducted different identification parade where Elias Kariithi Gichuki and Simon Mwangi Ngayai (2nd appellant) participated. The witness Christopher Campbell clause was able to identify all the accused and touched them and said he had no doubt as regards their identity. The witness produced as Exhibit 47 and 48 the relevant identification parade forms.
 - e. Further on the same date he further conducted a different parade for Samuel Mathenge (1st appellant) and he also consented to the parade being done. Christopher Campbell was able to identify him and said he was not in doubt about their identity. The parade forms were produced as Exhibit 40
 - f. On 31.08.2015 the 6th accused (Anthony Ndiga Wandu) identification parade was conducted and he refused to sign the identification parade forms. PW2 Kuria positively identified him by touching.
41. In cross examination by the 2nd appellant, PW11 stated that he participated in the identification parade voluntarily and PW8 Chris was able to identify him. During investigation he had been given him his phone number and also informed him that he had carried the 3rd appellant on his motor cycle. The 1st appellant was identified by PW2 Kuria and later some of the items were recovered from him. The identification parade was held behind the police station yard and he held separate identification parade for each accused.
42. Some of the parade members were members of the public and the area where the parade was conducted was a covered place within the police station yard. The police officers would get each accused from the cell and the witnesses never had a chance to see them prior to the parade. The members of the public who participated in the parade were of similar height, complexion and age and at the end of the process, the 3rd appellant also did sign the identification forms. PW11 in re-examination stated that



- during the identification parade none of the appellants was naked as they were properly identified. The witnesses also never got to see the accused in advance. He had also tried his best to get other member of the parade with similar features.
43. PW12 Cpl Raphael Munyao testified that in August 2015, he was attached to Flying Squad and that him and his colleagues were instructed by their supervisor to go to Gilgil and help investigate a robbery with violence case which occurred at Malewa Bush Camp. They went to the incident scene and were briefed of what transpired. On 10.08.2015 they got information that two of the robbers were in Nakuru. They went and arrested the 3rd appellant and Elias Kiirithi Gichuki. Various items were recovered from both the accused and an inventory was made which the 3rd appellant signed. From the 3rd appellant they recovered MFI-53 Nokia 1280, MFI-54(a) -Techno 342, MFI 54(b) ITEL phone, MFI 54 (c) sim cards found inside MFI 54(a), while MFI 54 (c) & (d) had Safaricom.
 44. On 12.08.2015 the investigation team got information that the 1st appellant was residing in Kinoo, they traced the house and found motor vehicle KBZ 9191J Toyota Wish. Inside the Toyota Wish they recovered several items which had been stolen from Malewa Bush Camp. The items included Sumsang travelling bag, 5 ipads, 3 apple laptops, Samsung phone, 8 sim cards, 1 power bank written Christine Campbell clause SNo.M2538F42D, 3 phone covers, Samsung phone batteries, 4 Charging cables, spanner, gas cylinder, handbag amongst other items which he all identified and signed the inventory together with Cpl Ngila. The 1st appellant was arrested and signed the inventory form too. The last accused (accused 6) was arrested in Eldoret.
 45. In cross examination PW12 stated that they did recover stolen items from the 1st appellant both from the house and in the car and an inventory done to specify what they recovered. Motor vehicle KBU 345G was never recovered and accused 5 told them it was taken to Tanzania. Further he did not investigate ownership of motor vehicle KBZ 919J and was not aware it had been hired by the 1st appellant.
 46. PW13 Inspector Joseph Njunge. Testified that in 2015 he was based at Gilgil police station and was requested by Inspector Jacinta to conduct and identification parade involving suspects in a robbery with violence case. The suspect involved was one Paul Thuita Wachira, who refused to sign the parade forms. The forms were produced as Exhibit 68. PW14 Chief Inspector John Songa testified that he was the scenes of crime officer gazetted under notice 5548 of July 2015. On 07.08.2015 he did visit the crime scene at Malewa Bush Camp and found that a robbery had taken place and the scene had been ransacked. He took photographs of the scene and later on 12.08.2015 he took photographs of motor vehicle KBZ 191J and the items recovered therein. He produced all the photographs into evidence. In cross examination he stated that he took photographs of the items inside the car and later removed them outside and took other photographs.
 47. PW15 Sgt Thomas Muriuki testified that he was the investigation officer and narrate at length the witness version as to how they were violently robbed. At the scene they were informed of a motor cycle suspected to have helped the robbers get away and the driver of the said motorcycle had been identified (being the 2nd appellant). They called him to the scene and interrogated him as to who his passengers were. At that time they had no knowledge linking him to the crime and decided to release him. Later they gave his phone number 0715064557 to the SPCU and found that the said number had called Kevo (the 3rd appellant) who was coordinating the robbery. Later on 11.08.2015 the 3rd appellant was arrested, while the 1st appellant was arrested on 12.08.2015 at Kinoo in Kiambu County. He was found in possession of various stolen items including laptops, gas cylinder, phones all loaded in motor vehicle KBZ 191J. Other accused persons too were arrested and charged together.



48. In cross examination, PW15 noted there was an error in the OB where the motor cycle was described KMDF 920T, the correct registration was KMDF 921T. The 1st appellant phone was analyzed by SPCU experts and it linked him with 3rd appellant several times on the said night. His phone number 0715064559 had called the 3rd appellants phone lines 0734224314 eight times while 0722693865 belonging to 3rd appellant received 30 calls from the 2nd appellant on the said evening and those phone calls could not be described as normal ordinary transport transactions. The 1st appellant was tracked and arrested in Kinoo. Recoveries were made from him and he was positively identified in the identification parade as the most aggressive robber on the night. The 3rd appellant using phone number 0734224314 had called the 2nd appellant eight times. The 1st and 2nd appellants were positively identified during the parade.
49. All the accused persons before the trial court were placed on their defence. The 1st appellant (who was accused no. 4) did testify that he was a gospel artist in Nairobi. On 06.08.2015 he was in his house in Kinoo Kiambu County and was not amongst the robbers who were in Malewa. On 12.08.2015 he was arrested at home and the police told him that he had suspected stolen goods. The goods belonged to his friend Karanja who had trouble with his landlord and requested him to store the goods for him. His phone number 0724139640 showed that he was in Nairobi and had never taken a driving license.
50. The 2nd appellant (1st accused at trial) did testify that he was a bodaboda operation in Gilgil. On 06.08.2015 he worked until 7.30pm and went home. At about 2.00am he received a call from a customer who wanted to be picked to enable him travel to Nairobi by 6.00am. It had rained and they agreed that he walks to the road. He went to pick him and found that he was with two other men whom he didn't know. He carried them and dropped them in gilgil. At about 5.00am he got a customer and was informed about the robbery. They went to the scene and the police inquired about the people he had carried. He was later arrested and charged in court. In cross examination he stated that he received a call from his customer who he identified as the 3rd appellant, who had been his client for over one and half years. He knew the 3rd appellant and his brothers. He confirmed that he had three passengers and did not recognize the other two passengers.
51. The 2nd appellant called his mother Agnes Muthoni Nguyai as his witness. She stated that on 06.08.2015, she had dinner with his son and later at about 2am heard him leave with his motor cycle. Later the 2nd appellant was arrested. In cross examination she confirmed that they reside within one compound and could not tell where he was going at night. On the said night the 2nd appellant was alone as his wife had travelled. She recognized the 3rd appellant and knew his parents but did not know them by names.
52. The 3rd appellant (2nd accused person at trial) testified that he was a mechanic in Gilgil and also sold cows as his side business. On 07.08.2015 he was at home. Later he was arrested and brought to Gilgil. He was not involved in the robbery and never took a lift on the 1st appellant motorcycle. He did not even know the 1st appellant.

C. Submissions

1st Appellant Submissions

53. The 1st appellant did file submissions on 19.10. 2022 and stated that his conviction was premised on identification evidence which was not free from the possibility of error and the trial magistrate failed to properly evaluate the same. The identification by PW5 Benson Mureria Muhindi and PW8 Christopher Campbell clause was under difficult circumstances and therefore shaky. Reliance was



placed on Kamau versus Republic (1975) EA 139 Anjoni Versus Republic (1980) KLR 59 and Republic and Tumbull and others (1976) ALL ER 547.

54. PW8 further did not give his description to the police as would have been expected and that his evidence should be treated as an afterthought or mere drill identification. Reliance was placed on Tekerali Kirongozi and 4 others versus Republic (1952) 19EACA 259, Republic versus Shaban Bin Donaldi (1940) 7 EACA and Anjoni versus Republic (1980) KLR. PW8 too was a witness with doubtful credibility and there was no credible, independent and corroborative evidence, linking of the appellant to the crime. He placed reliance on Ndungu Kimanyi versus Republic (1979) KLR.
55. The second ground of submission was that the identification parade as conducted was flawed and could not support his conviction. PW11 Chief Inspector Simon Kirui conducted the identification parade on 12.08.2015 and erred by not allowing the 1st appellant friend, solicitor to be present, the said parade was conducted in an open yard within the police station yet it should have been held on an enclosed compound where other spectators could be excluded. PW5 was also influenced as he had been told to check if they would recognize the robbers who attacked them, which act considerably depreciated the exercise. The other error was to use the same witnesses who had earlier identified other suspects in the same set of parade members as the police would only remove the identified suspect and replace him with another suspect, thus making it easy for the witness to identify the new suspect. Reliance was placed on Oluoch versus Republic, David Mwita Wanja and 2 others versus Republic (2007) eKLR.
56. The evidence of PW8 that he did identify the appellant by his boots 'dockers' too had to be taken with a pinch of salt as it was not mentioned in the first incident report and as a fact dockers boots were commonly available and did not have special marks to enable the witness identify them. The final error of the identification parade was the use of persons who did not share the same identification features and thus the overall failure to adhere to identification guidelines affected the evidential value of the entire process. Reliance was placed on Simon Kihanya Kairu and another versus Republic, Samuel Kilonzo Musau versus Republic and Republic versus Mwangao Sio Manaa.
57. The 1st appellant did further submit that the evidence tendered did not prove that he participated in the robbery and no ingredient of the offence was established as against him. The trial magistrate also fell in error by not considering his defence and also wrongly convicted him yet he had raised a strong alibi which the prosecution did not discount.
58. The final issue raised by the 1st appellant was that the judgment was not compliant with provision of Section 168 (c) of the CPC thus prayed that his appeal be upheld and his conviction and sentence be set aside.

2nd Appellant Submissions

59. The 2nd appellant did file his submissions on 27.01.2023 and he too did submit that the visual identification was doubtful and not free from possibilities of error. His identification was based on evidence of Pw8 Christopher Campbell and PW2 Stephen Kuria. Pw2 was not cross examined and thus his evidence could not be relied on, while PW8 did not explain clearly the circumstances which could render his identification to be positive and the court gave scant attention to the facts that conditions of identification were not conducive. Pw8 did not give his description to the police and thus his identification though the parade was an afterthought. Reliance as placed on Tekerali Kirongonzi and 4 others republic (1952) EACA, Republic versus Shaban Bin Donald (1940)EACA 70 and Ndungu Kimanyi versus Republic (1979)KLR.
60. The identification parade as conducted too was flawed and could not support the conviction as he had earlier as 10.08.2015 been taken to court which was a public place and he could be easily identified in



open court. On 07.08.2015 PW2 had identified him at the scene of crime as the person who rode the motor cycle which carried the robbers and thus having interacted with the complainant there was no need for a parade to be conducted. Further PW11 did not allow any of his friend or solicitor to attend the parade and used the same parade members in contravention of rule 6(iv), (d) of the police standing orders regarding as to how a parade was to be conducted. Reliance was placed on David Mwita Wanja and 2 others versus Republic, Republic versus Mwangi S/O Masnaa and SSentale versus republic.

61. Further the 2nd appellant did submit that his arrest had no nexus to the robbery. PW11 and PW15 called him to the scene and he explained his position with regard to the passengers he had carried and whom he did not know had robbed the complainants. If indeed he was one of the robbers he would have escaped and his behavior did not show him to be person who had committed a robbery. Reliance was placed on Elikana Kangunda Njoroge versus Republic (2017) eKLR. He was wrongly convicted based on circumstantial evidence and his guilt was not proved beyond reasonable doubt. See Wilmington versus DPP (1935) AC and Miller versus Minister of Pensions (1947) and ALL ER 372.
62. The phone data was not enough collaborative evidence to convict him as the actual Safaricom data to show the communication with the 3rd appellant was not availed in court as evidence. The evidence presented did not meet the threshold of production of electronic evidence as set out under sec 78(A), (1),(2),(3),(a),(b),(c),(d) and (4) of the Evidence Act. The trial magistrate was also faulted for failing to consider his defence. The 2nd appellant prayed for this appeal to be allowed and the conviction and sentence be set aside.

3rd Appellant Written Submissions

63. The third appellant did file his submission on 27.01.2023 and similarly challenged his visual identification and the identification parade as held. PW5 and PW8 were not reliable witnesses as they did not demonstrate which conducive environment prevailed to enable them positively identify the 3rd appellant. PW3 Sharon Linda had stated that the three robbers covered their face and PW1 also could not identify any of the robbers. The evidence of PW8 too with respect to positive identification was general and he did not mention any special feature which stood out. He could have been an honest witness but mistaken in his identification. Reliance was placed on Wamugunda versus Republic (1989)IKLR, Rona versus Republic (1967) EA 583, Republic versus Turnbull and others and Francis Kariuki Njuri and 7 others versus Republic (Criminal Appeal no.6 of 2007)UR.
64. PW5 and PW8 further did not give his description to the police on their first information report and therefore their evidence was an afterthought and not reliable. Reliance was placed on Republic versus Shaban Ben Donald (1940) 7EACA, Adjononi versus Republic (1980) KLR and Ndungu Kimenyi versus Republic (1979) KLR 282.
65. The identification parade conducted on 15.08.2015 by PW11 Chief Inspection Simon Kurui was flawed. He was identified in the parade by PW2, PW5, PW8 and Milka Nyawera Njenga. PW2 evidence had little value as they were not cross examined while Milka Nyawera did not testify. The process was further faulted because PW2 identified him on 12.08.2015 while the 2nd identification parade for PW8 was conducted on 15.08.2015. PW2 was PW8 worker and had obviously discussion with him what transpired on 12.08.2015. Further he was not allowed to call any of his friend or solicitor. All the parade members were the same yet the accused did not share the same identification features. Reliance was placed on the case of David Mwita (supra).
66. Further his identification by PW5 Benson Mareria Muhindi too was flawed as PW11 influenced PW5. The identification parade was conducted without following the regulations of the police force standing



orders and thus the process could not be upheld. Reliance was placed on Simon Kihinya Kairui and another versus Republic, Republic versus Mwengo S/O Monaa and SSentale versus Uganda.

67. Finally, the 3rd appellant did state that the charge of robbery with violence could not be sustained as he was not identified, nor was he armed. In short, there was no evidence to prove that he was amongst one of the robbers. He did not commit the offence nor was he found in possession of any stolen goods when arrested in Nakuru. There was no evidence tendered to show communication with the 2nd appellant and the SPCU officers did not testify to corroborate that evidence. He was only arrested based on suspicion which could not prove the prosecution case. Reliance was placed on Suleiman Juma alias Tom M versus Republic CR Appeal no. 181 of 2022.
68. The 3rd appellant thus did pray that his appeal be allowed and both sentence and conviction be set aside.

D. Determination.

69. This being the first appeal, this court is expected to re-evaluate the evidence tendered before the trial court and to come up to its own logical conclusion by taking into account the fact that it did not have the advantage of seeing and hearing the witnesses and their evidence and/or see their demeanor. This court is guided by The Court of Appeal case of Okeno – VS – Republic (1972) EA 32 where it was stated as follows: -

“An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the Appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and conclusions. Only then can it decide whether the magistrate’s findings can be supported. In doing so, it should make an allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses”.

70. Also in Peter’s vs Sunday Post (1958) E.A. 424 it was said that it is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts finding and conclusion: it must make its own findings and draw its own conclusions. Only then can it be decided whether the magistrate findings should be supported. In doing so it should make allowance for the fact that the trial court had the advantage of hearing and seeing witnesses.
71. In the case of Republic Vs Edward Kirui (2014) eKLR, the Court of Appeal quoted the Supreme Court of India case of Murugan & Another Vs State by Prosecutor, Tamil Nadu & Another (2008) INSC 1688 where the case of Bhagwan Singh Vs State of M. P. (2002)4 SCC 85 was cited as follows: -

“The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view of ignoring the admissible evidence, a duty is cast upon the High Court to re-appreciate the evidence on appeal for the purpose of ascertaining as to whether all or any of the accused has committed any offence or not.”

72. From the grounds of appeal raised by all the appellants, the issues brought forth can be summarised as follows;
- a. Whether the offence of Robbery with Violence was proven against the Appellant’s to the required legal standard.



- b. Tied to the above is the question of whether, the learned trial magistrate, erred in both law and fact in his evaluation of the evidence as regards identification by recognition, which was highly compromised and/or also erred in relying on a compromised identification parade which did not meet the threshold as set out by provisions of section 46 of the Force standing orders.
- c. If the trial court failed to consider the 1st and 2nd appellant's Defence presented during trial.

Burden of Proof

73. It is trite law that all criminal offences require proof beyond reasonable doubt. Lord Denning in *Miller vs. Ministry of Pensions* (1947) 2 All ER, 372 stated as follows;

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is beyond reasonable doubt, but nothing short of that will suffice.”

74. The conceptual framework for burden of proof to be discharged by the prosecutor is beyond reasonable doubt. In *Viscount Sankey LC in the case of H.L Woolmington Vs DPP {1935} A.C. 462* pp 481 did describe burden of proof in criminal matters as;

“Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoners guilt subject to what I have already said as to the defendant's insanity and subject also to any statutory exception. If at the end and on the whole of the case, there is reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether {the offence was committed by him} the prosecution has not made out the case and the prisoner is entitled to be acquitted. No matter what the charge or where the trial, the principal that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

I. Whether The Offence Of Robbery With Violence Was Proven Against The Three Appellants To The Required Legal Standard.

75. The appellants were all charged with the offence of Robbery with Violence, which is provided for under the Section 295 as read with 296(2) of the Penal Code. The said provision states as follows:

“296

- (2). Punishment of robbery
 1. Any person who commits the felony of robbery is liable to imprisonment for fourteen years.
 2. 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 before or immediately after the time of the robbery, he wounds, beats, strikes or uses any



other personal violence to any person, he shall be sentenced to death.”

76. The ingredients of this offence were aptly discussed by Cockar, C.J., Akiwumi & Shah, JJ.A. In the case of Johana Ndungu vs. Republic CRA. 116/1995, [1996] eKLR where the Court of Appeal in Mombasa stated as follows: -

“In order to appreciate properly as to what acts constitute an offence under Section 296 (2) of one must consider the subsection in conjunction with Section 295 of the PC. The essential ingredient of robbery under Section 295 is ‘use of or threat to use’ actual violence against any person or property at or immediately after to further in any manner the act of stealing. Thereafter, the existence of the afore -described ingredients constituting robbery are presupposed 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 subsection:

- (i). If the offender is armed with any dangerous or offensive weapon or instrument;
or
- (ii). If he is in company with one or more other person or persons; or
- (iii). If at or immediately before, or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.”

77. What constitutes the offence of robbery with violence was also well captured in the case of Olouch vs Republic (1985) KLR where the Court of Appeal stated as follows: -

“...Robbery with violence is committed in any of the following circumstances:

The offender is armed with any dangerous and offensive weapon or instrument; or

The offender is in company with one or more person or persons; or

At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person.”

78. Also, In the case of Dima Denge Dima & Others vs Republic, Criminal Appeal No. 300 of 2007, it was stated that:

“...The elements of the offence under Section 296 (2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence.

79. From the evidence adduced by the prosecution witnesses, it is not is doubt that indeed a robbery occurred on the night of 6th and 7th August 2015, at Malewa bush ventures camp at Gilgil within Nakuru county. PW1, PW2, PW3, PW4, PW5, PW8, narrated at length how they were accosted by gun trotting robbers, huddled together in the kitchen, tied up and robbed off, all their valuables during a robbery incident which took over place from 7pm to 1am the following morning. PW14 Chief Inspector John Songa also produced photographs of the robbery scene as Exhibit 69 and 70. PW11 Simon Kirui (OCS Gilgil police station) and PW 15 Sergeant Thomas Muriuki, the investigation officer too did visit the scene and corroborate the evidence of the above witnesses.

80. From the evidence adduced, it is common ground that the said robbers were armed with an AK 47 assault rifle, a pistol and PW8 was threaten with a knife, when he stopped one of the robbers, who was



attempting to violate the nurse Milka. The robbers were about five (5) in number and invariably used personal violence as against the said witness by roughing them up, tying them during the robbery period and one of them even attempting to rape the Nurse Milka. All this constituted personal violence during the incident. It therefore stands that all the ingredients of the said offence were adequately proved.

81. Having confirmed that indeed an incident of robbery with violence had occurred at Malewa bush ventures camp, the next question in this appeal which remains for determination is whether the witnesses properly identified the 1st to 3rd appellants as being amongst those who robbed them on the night of 6th into 7th August 2015 and as to whether the identification parade carried out was proper.

II. Whether, The Learned Trial Magistrate, Erred In Both Law And Fact In His Evaluation Of The Evidence As Regards Identification By Recognition, Which Was Highly Compromised And Also Erred In Relying On A Compromised Identification Parade Which Did Not Meet The Threshold As Set Out By Provisions Of Section 46 Of The Force Standing Orders.

82. The appellants were identified by witnesses who saw them at the scene of crime and also later did attend the various identification parade picked them out as their assailants. The identification parades were carried out by PW11 Chief Inspector Simon Kirui who explained at length the process he undertook with respect to each appellant and other co accused who were eventually acquitted. For purposes of this appeal the evidence of PW2 will not be considered as he did not finish giving his evidence in chief. During his evidence in chief, on suggestion the appellants advocate the court decided to visit the locus on quo and after that, he was not recalled to continue with his evidence.

83. Before addressing the question of identification, it is important to recall that the quality of witness memory may have as much to do with the absence of other distractions during the incident and also as with duration/period of time that passes between the event and the eventual recollection of a particular piece of information. At different stages, memory can be affected by a variety of factors such as was held in *S v Henderson*: - the factors that the court will consider are;

- a. Whether the witness was under a high level of stress. Even under the best viewing conditions, high levels of stress can reduce an eyewitness's ability to recall and make an accurate identification.
- b. Whether a weapon was used, especially if the crime was of short duration. The presence of a weapon can distract the witness and take the witness's attention away from the perpetrator's face. As a result, the presence of a visible weapon may reduce the reliability of the subsequent identification if the crime is of short duration.
- c. How much time the witness had to observe the event. Although there is no minimum time required to make an accurate identification, a brief or fleeting contact is less likely to produce an accurate identification than a more prolonged exposure to the perpetrator. In addition, time estimates given by a witness may not always be accurate because witnesses tend to think events lasted longer than they actually did.
- d. Whether the witness possessed characteristics that would make it harder to make an identification, such as the age of the witness and the influence of drugs or alcohol. An identification made by a witness under the influence of a high level of alcohol at the time of the incident tends to be more unreliable than an identification by a witness who consumed a small amount of alcohol.



- e. Whether the perpetrator possessed characteristics that would make it harder to make an identification. Was he or she wearing a disguise? Did the suspect have different facial features at the time of the identification. The perpetrator's use of a disguise can affect a witness's ability both to remember and identify the perpetrator. Disguises like hats, sunglasses, or masks can reduce the accuracy of an identification. Similarly, if facial features are altered between the time of the event and a later identification procedure, the accuracy of the identification may decrease.
 - f. How much time elapsed between the crime and the identification? Memories fade with time. The more time that passes, the greater the possibility that a witness's memory of a perpetrator will weaken.
 - g. Whether the case involves cross-racial identification. Research has shown that people may have greater difficulty in accurately identifying members of a different race.
 - h. Whether the observation of the perpetrator was close or far. The greater the distance between an eyewitness and a perpetrator, the higher the risk of a mistaken identification. In addition, a witness's estimate of how far he or she was from the perpetrator may not always be accurate because people tend to have difficulty estimating distances.
 - i. Whether or not the lighting was adequate during the observation. Inadequate lighting can reduce the reliability of an identification.
 - j. The confidence of the witness, standing alone, may not be an indication of the reliability of the identification, but highly confident witnesses are more likely to make accurate identifications. Even an identification made in good faith could be mistaken.
84. The fundamental aim of eyewitness identification evidence is reliably to convict the guilty and to protect the innocent. The common law recognized several categories of identification evidence because the potential dangers of identification evidence differ between the categories. One is Positive Identification Evidence, which is evidence by a witness identifying a previously unknown person as someone he or she saw on a period relevant to the incident. Such evidence may be used as direct or circumstantial proof of an offence.
85. The second category is Recognition Evidence, which is evidence from a witness that he or she recognizes a person or object as the person that he or she saw, heard or perceived on a relevant occasion. In *Kariuki Njiru & 7 others v Republic* the court held that evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error.
86. Further to determine whether identification is truthful, that is, not deliberately false, the court must evaluate the believability of the witness who made an identification. In doing so, the court may consider the various factors for evaluating the believability of a witness's testimony. Regarding whether the identification is accurate, that is, not an honest mistake, the court must evaluate the witness's intelligence, and capacity for observation, reasoning and memory, and be satisfied that the witness is a reliable witness who had the ability to observe and remember the person in question. Further, the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person, and whether the victim knew the accused before. See *R Vs Turnbull & others* (1976) 3 ALL ER 549.



87. Finally, the trial court is also expected to assess the demeanour of a witness and in carrying out such an assessment, the court is expected to make a finding as to the integrity, honesty and truthfulness of such witnesses not his or her boldness or firmness.
88. The 1st appellant was positively identified by PW1, PW5 and PW8 as one of the robbers who attacked them. PW1 did state that there was ample light in the kitchen and he did positively identify the 1st appellant. PW5 too did testify that it was the 1st appellant who took PW4 to the main house and ransacked the rooms therein. He said “The 3rd and 4th accused took Christine to the rooms to search. I saw them clearly”. PW5 and PW8 too were certain during identification parade that the 1st appellant was amongst the robbers who attacked them and pointed him out when the exercise was held on 12.08.2015 and 15.08.2015.
89. Apart from identifying the 1st appellant by his physical features, PW8 further noted that the 1st appellant was still wearing the same dockers boots he had on during the robbery, when he was arrested and during the identification parade. PW15 also confirmed that PW8 identified 1st appellant as the most aggressive of the whole group of robbers. The 1st appellant consented to the parade being done and the parade forms were produced as Exhibit 40 and 44.
90. PW 7 also did confirm to court that it was the 1st appellant who hired motor vehicle KBZ 919J Toyota Wish on 09.08. 2015 and later on 12.08. 2015 was called by the police at Gilgil police station and informed that the said motor vehicle had been detained for having stolen property stored in it. The 1st appellants’ copy of national identity card, car hire agreement, and logbook were produced as Exhibits 37- 39.
91. PW 12 also narrated how they tracked the 1st appellant and got information that he was staying at Kinoo. They traced the place and arrest him and found the hired motor vehicle KBZ 919J Toyota wish, which was parked outside his house. Inside the said motor vehicle, they recovered several stolen items from the robbery at Malewa bush ventures Camp. The said recovered items were listed in the inventory, signed by both the witness and the 1st appellant and which inventory was produced as Exhibit 59.
92. The 2nd appellant was positively identified by PW2, PW6, and PW8 as one of the robbers. PW6 saw him driving the getaway motor cycle KMDF 921T, they followed him and as they passed him, he did recognize him as a person he knew. His evidence was that;
- “when we passed the motor cycle, I saw the driver. He slowed down and asked us if there was a problem. I recognized the driver as Mwangi. Mwangi (Accused 1) proceeded. We told him there was no problem. we followed until we reached the junction at syndicate. Mwangi stopped about 100m away and returned. Two people alighted from his bike. Mwangi asked us if there was a problem, we told him our boss had been attacked. He gave us his phone no, then we went back to langalanga.”
93. The 2nd appellant consented to the identification parade being carried out and the parade forms were produced as Exhibit 48. PW 8 attended the identification parade conducted on 15.08.2015 and positively identified the 2nd appellant by touching him. Further from the evidence adduced the 2nd appellant did not dispute that on the night of the incident he carried two passengers’ in the early morning of 07.08.2015 and did not dispute PW6 evidence that, they followed him and they spoke. It is also emerged from the evidence that it was the 2nd appellant who upon interrogation divulged the information that one of his passengers on the material night was the 3rd appellant and they had communicated constantly during the night.



94. The 3rd appellant too was positively identified by PW1 and PW5 in court and later by PW5 and PW 8 during the identification parades carried out on 12.08. 2015 and 15.08.2015 respectively. He was further identified by PW2 and Milka Nyawira. PW5 in his evidence in chief did state that within the kitchen area where they were held for about two hours had enough light and he was able to clearly see the robbers. His evidence verbatim was that;

“At the kitchen I had been able to see the robbers clearly. There was light in the kitchen. I identified three men. The three are before court. It is the 2nd, 3rd and 4th accused in the dock.

The 2nd accused is the one who brought my phone. He also asked Chris if he was the person he hears about. The 3rd and 4th accused took Christine to the rooms to search. I saw then clearly when they picked Christine.

I had not seen the 2nd, 3rd and 4th accused prior to this day.

(Accused 2 and 4 before the trial court, was the 3rd and 1st appellant herein respectively.)

95. PW8 on the other hand in his evidence stated that;

“I saw five individuals’ during the robbery. One or two tried to cover his face using a shawl, but the cover would fall again. Two were tall one dark and one light. I also tried to identify them while I was lying on the floor and I noted the distinctive boot. Another was in a jacket and very smartly dressed..... I was able to see the robbers. I then attended an identification parade at Gilgil police station so did keith, kuria.

I identified the suspects separately. whenever I identified people it would be recorded. I identified for 6th accused and 4th accused. The identification parade form for Samuel Mwaniki is MFI 40.

I also identified the 2nd accused due to his facial features and he was wearing the same boots. I cannot recall 2nd accused with clarity. It had been three and half years since the incident and what I said at the identification parade would be accurate.

96. The said identification was by touching him during the parade and the 3rd appellant did consent to this process. The identification parade forms were produced as Exhibit 43 and 41 respectively. PW5 too stated that it is the 3rd appellant who took his phone from him and as noted earlier the 3rd Appellant was also squarely placed at the scene of the robbery by the 2nd appellant, who in his defence testified that he was called by the 3rd appellant and picked him up at ungodly hours of 2.00am and took him too Gilgil.

97. Considering all the evidence in totality especial with respect to positive identification of the appellants by PW1, PW5 and PW8 and considered as well with all circumstantial and direct evidence adduced by all the witnesses who testified, there is no doubt in my mind that the appellants were all positively identified as the perpetrators of the robbery which occurred on 6th night in to 7th of August 2015 at Malewa Bush ventures Camp in Gilgil.

98. The robbery incident took place from 7pm to 1am in the morning, which was a period of about six hours which the witnesses spent in the presence of the robbers. Specifically, while held in the kitchen, which was well light by normal electricity light the robbers spent at least two (2) to three (3) good hours in the immediate presence and close proximity of the witnesses, even though such situations are stressful, it is my finding that the witness’s had proper and ample opportunity to observe and clearly see the assailant’s as there was nothing obstructing their view.



100. A few of the robbers attempted cover their face with scarf but as PW8 pointed out, the said scarf kept falling off and did not serve the intended purpose. It should also be noted that the appellants were arrested within a few days after the robbery and identification parade held within the same week. The witness's memories of the events were still vivid and they were in a position to identify the perpetrators.
101. The appellants did contend that the witnesses did not give their description to the police and/or did not do so during the first information report. This position is not true as the evidence of PW1, PW2, PW3, PW5, PW8 they did describe the various features of the robbers as reported to the police and in their evidence in chief. This was with respect to what the robbers were wearing, complexion, body structure (Hight/small), facial features (eg somali like), and even the shoes they had put on. The trial court did examine all these aspects of evidence presented and made a finding that the witness's evidence was honest, truthful and cogent.

III. Identification Parade

102. The appellants also did raise the issue that the identification parade was not conducted as per provisions the police standing orders. The procedures governing police identification parades are provided for in the Police Force Standing Orders pursuant to the National Police Service Act.¹ These procedures were explained in *R v Mwango s/o Manaa*² and *Ssentale v Uganda*.³ The rules include: -
- a. The accused has the right to have an advocate or friend present at the parade;
 - b. The witness should not be allowed to see the suspect before the parade and the suspects on parade should be strangers to the witness;
 - c. Witnesses should be shown the parade separately and should not discuss the parade among themselves;
 - d. The number of suspects in the parade should be eight (or 10 in the case of two suspects);
 - e. All people in the parade should be of similar build, height, age and appearance, as well as of similar occupation, similarly dressed and of the same sex and race;
 - f. Witnesses should be told that the culprit may or may not be in the parade and that they should indicate whether they can make an identification; and
 - g. As a recommendation, the investigating officer of the case should not be in charge of the parade, as this will heighten suspicion of unfair conduct in the courts.
103. Identification of a suspect in any criminal offence is always a pivotal question and whenever it arises, the trial court has to satisfy itself, before convicting that it was properly undertaken. The evidence must be such that threshold set by the rules and decided case law has been met. The evidence must leave no doubt that the suspect was positively identified. If the police force standing orders in respect of conduct of identification parades are flouted, the value of the evidence of identification depreciates considerably.

¹ (content missing)

² (content missing)

³ (content missing)



104. A cautionary rule with particular application to identification evidence was formulated by Dowling. In the much-cited case *R v Shekele*. It is worth repeating: -

“Questions of identification are always difficult. That is why such extreme care is always exercised in the holding of identification parades - to prevent the slightest hint reaching the witness of the identity of the suspect. An acquaintance with the history of criminal trials reveals that gross injustices are not infrequently done through honest but mistaken identifications. People often resemble each other. Strangers are sometimes mistaken for old acquaintances. In all cases that turn on identification the greatest care should be taken to test the evidence. Witnesses should be asked by what features, marks, or indications they identify the person whom they claim to recognise. Questions relating to his height, build, complexion, what clothing he was wearing and so on should be put. A bald statement that the accused is the person who committed the crime is not enough. Such a statement, unexplored, untested and un-investigated, leaves the door wide open for the possibility of mistake. Where the accused is an ignorant native who is unrepresented by counsel or attorney and who is therefore unable himself to probe the evidence of identification and where the prosecutor has not done so, the court should undertake this task, as otherwise grave injustice may be done.”

105. The Court of Appeal in *Samuel Kilonzo Musau v Republic*⁴ stated: -

“The purpose of an identification parade, as explained in *Kinyanjui & 2 Others v Republic* (1989) KLR 60, “is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify, and for a proper record to be made of that event to remove possible later confusion.” It is precisely for that reason that courts have insisted that identification parades must be fair and be seen to be fair. Scrupulous compliance with the rules in the conduct of identification parades is necessary to eliminate any unfairness or risk of erroneous identification. In particular, all precautions have to be taken to ensure that a witness’s attention is not directed specifically to the suspect instead of equally to all persons in the parade. Once a witness has properly identified a suspect out of court, the witness is allowed to identify him on the dock on the basis that such dock identification is safe and reliable, it being confirmed by the earlier out of court identification.”

106. PW11 Chief Inspector Simon Kirui did testify at length and gave a comprehensive evidence of how he did conduct the identification parades. He held separate parades for each appellant, went out of his way to incorporate participant’s with similar features whom he got from the cells and members of the public and made sure he did rotate the appellants to different positions especially on the parade of 12.08.2015, where there were different witnesses. The appellants raised an objection, that the parade was conducted within open grounds at the police station, PW11 in cross examination by the 1st appellant did state that,

“The identification parade was in a covered area behind the station in a yard. The other officers would get you from the cell. You were brought from the cells and the witnesses never had a chance to discuss. The members were not an exact replica of you but we tried to get people of your height, complexion and Age. You were satisfied with the identification parade and you signed.”

⁴ (content missing)



107. The appellants further faulted the trial magistrate for failing to find that they were not allowed to call their friends or solicitor during the identification parade and this rendered the process to be a nullity. This contention must be taken with a pinch of salt as all the appellant signed the identification parade forms and did not raise any complain then, nor did they even question PW11 about the same. It is obvious that that the said line of defence is an afterthought and is not merited.
108. Indeed, having signed the identification parade forms, which were produced as Exhibits 40, 43, 44, and 48 and the appellants having in their defence failed to adduce any evidence challenging the identification parade process, it is too late in the day to raise a complaint about the same, when they did not do so during the proceedings. In conclusion I do find that the different identification parades were held as provided for by Police Force Standing Orders pursuant to the [*National Police Service Act*](#).
109. When all facts and circumstance of the case were considered, the prosecution evidence was solid and the charge as against the appellants were proved. This court has therefore no basis to depart from the said finding.

IV. Failure of the trial court to consider the appellants Defence as raised during the trial.

110. The 1st and 2nd appellant did raise in their submissions that the trial court erred in failing to consider their defenses as raised during trial and that the trial Magistrate did not give their evidence an objective and open-minded analysis. The trial magistrate has a duty to test and consider the appellant evidence against the evidence adduced by the prosecution and if there is doubt it should be have been resolved in their favour. The trial court did at page 16of the judgment (marked as page 139 of the proceedings) analyze the appellants evidence and thereafter in the subsequent pages proceed to compare the same with the prosecution evidence. The trial court thus cannot be faulted as not having considered the same as the trial record bears a different proposition.

V. Sentencing

111. The appellants did not raise any issue regarding sentencing, but the court notes the recent and ongoing debate and review of the law as relates to the same. In the landmark ruling by Supreme Court in Francis Karioko Muruatetu & Ano Vrs The Republic, Petition No 15 & 16 of 2015 consolidated, the court did declare that mandatory death sentence was unconstitutional and directed the legislature and Kenya law reform commission to effect the necessary reforms, to give effect to its judgement.
112. Though the Muruatetu judgment referred to murder, the court of Appeal in William okungu kittiny Vs Republic (2018) eklr , did confirm that the same can also be applied in other cases where the law provides for mandatory sentence. The court did state that;

“The appellant was sentenced to death for robbery with violence under section 296(2). The punishment provided for under section 203 as read with section 204 and for robbery with violence and attempted robbery with violence under section 296(2) and 297(2) is death. By Article 27(1) of [*the constitution*](#), every person has inter alia, the right to equal protection and equal benefit of the law. Although the Muruatetu’s case specifically dealt with the death sentence in general.....From the foregoing, we hold that the findings and holding of the supreme court, particularly Paragraph 69 applies mutatis mutandis to section 296(2) and section 297 (2) of the penal code. Thus, the sentence.....is a discretionary.....”



113. The Judiciary sentencing policy Guidelines (2016) at paragraph 25 also provides that;

“where there are guideline judgements, that is, decisions from the superior courts on a sentencing principle, the subordinate courts are bounded by it. It is the duty of the court to keep abreast with the guideline judgments pronounced. Equally, it is the duty of the prosecutor and defence counsel to inform the court of existing guideline judgments on an issue before it.”

D. Conclusion

114. Flowing from my analysis and conclusions on all the issues discussed above, it is my finding that the trial court did not misdirect itself in returning a finding of guilty. The conviction is supported by evidence on record and I find no reason to disturb the same. The appeal against conviction is thus dismissed.

115. On sentencing this court notes the current jurisprudence on mandatory sentences, the judicial sentencing policy, international human right position regarding death sentence and ongoing process to amend the law as relates death penalties, as well as the appellant’s rights to fair trial, which includes discretionary sentencing. Having considered all the parameters applicable, I do quash and set aside the death sentence imposed on all the appellants herein and substitute the same by sentence all the appellants to serve a term of 40 years imprisonment. The sentence will run from the dates of arrest of the appellants (12.08.2015, 09.08.2015, and 10.08.2015 in conformity with Section 333(2) of the CPC).

116. Right of appeal 14 days.

117. Judgment accordingly.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 30TH DAY OF OCTOBER 2023.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 30th day of October 2023

In the Presence of

1st Appellant.....

2nd Appellant.....

3rd Appellant.....

-----For ODPP

-----Court Assistant

