



**Ndamberi & 2 others v Republic (Criminal Appeal E009, E010, E011 & E012 of 2021
(Consolidated)) [2023] KEHC 24688 (KLR) (30 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24688 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL APPEAL E009, E010, E011 & E012 OF 2021 (CONSOLIDATED)
FROO OLEL, J
OCTOBER 30, 2023**

BETWEEN

ISAAC KARUIKI NDAMBERI 1ST APPELLANT

CHRISTOPHER BUNDI MBOGO 2ND APPELLANT

KENNEDY GACHOKI KANGURU 3RD APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal arising from the judgement of the Honourable G. M. Mutiso – Senior Principal Magistrate delivered on 14th day of July 2021 in Wang’uru Criminal Case No.385 of 2018)

JUDGMENT

A. Introduction

1. The Appellants herein, James Gitonga Mawira, Isaac Kariuki Ndamberi, Christopher Bundi Mbogo and Kennedy Gachoki Kanguru, (hereinafter referred to as Appellants and/or the 1st-4th accused respectively), were charged with the offence of robbery with violence contrary to Section 295 as read with Section 296 (2) of the penal code. The particulars of the offence were that on the 1st day of July 2018, at Ndindiruku village in Mwea East within Kirinyaga county, the accused persons jointly with others not before the court and while armed with a dangerous and offensive weapon namely AK-47 riffle robbed Margaret Wanjiku Mwangi cash over Ksh.200,000 (two hundred thousand only) and immediately before or immediately after the time of such robbery caused the death of the said Margaret Wanjiku Mwangi and Stephen Muriithi Wachira.
2. The Prosecution called seven (7) witnesses who testified in support of their case and at the close of the Prosecution case, all the appellants were put on their defence and gave sworn testimony. Upon considering the evidence as presented, the trial court did find that all the appellants guilty of the offence



of robbery with violence contrary to Section 296 (2) of the penal code and proceeded to sentence the four of them to suffer death as provided under Section 296(2) of the penal code.

3. The Appellants, being dissatisfied with the said convictions and sentence filed the four instant petitions of appeal on 11th August 2021 where they all raised nine (9) similar grounds of appeal including;
 - a. That the whole proceedings were conducted un-procedurally.
 - b. That the learned trial Magistrate was biased right from the beginning and throughout the trial.
 - c. That the learned trial Magistrate misdirected himself by shifting the burden of proof on the Appellants.
 - d. That the magistrate proceeded to convict the appellants on false and non-existent evidence.
 - e. That the magistrate misdirected himself on the law by relying on a flawed identification parade.
 - f. That the magistrate misled himself by relying on purely fabricated evidence.
 - g. That the magistrate misdirected himself on facts and relied on non-existent evidence.
 - h. That the learned trial Magistrate failed to appreciate that no complaint was ever made to the police against the appellant herein and that no evidence of his arrest was ever adduced and further that dock identification cannot be relied upon to convict. (Additional ground by the 1st Appellant.)
 - i. That the magistrate misdirected himself and accorded himself the role of a prosecution witness.
 - j. That the magistrate meted out sentence based on extraneous unsolicited sources.

4. For purpose of clarity in following the proceedings it is important to note that James Gitonga Mawira, the 1st appellant (was the 3rd accused at trial), Isaac Kariuki Ndamberi the 2nd appellant (was the 1st accused at trial), Christopher Bundi Mbogo the 3rd appellant (was the 4th accused at trial) and Kennedy Gachoki Kanguru the 4th appellant (was the 2nd accused at trial)

B.The facts of the case

5. PW1, Dr. Kamande Kenneth Njoroge Reg. No. A010398 testified that he worked at Karira Mission Hospital and held a MBCHB from Egerton University. On 9th July 2018, he performed a post mortem at Our Lady of Lourdes Mwea Hospital Mortuary on the body of Margaret Wanjiku Mwangi and made the following observations;
 1. The frozen body was of a female African 40 years heavily built; 173 cm in height.
 2. On external appearances, the following was observed;
 - a. The eyes were pale.
 - b. Body had two cm circular wound on the left axilla, posterior to the mid axillary line at the 6th rib, which was a bullet entry point.



- c. The body had a 4cm by 4cm wound on the right rib with irregular margins.
 - d. On the right elbow inner side there was 8cm by 8cm burn wounded with irregular margins.
 - e. The right and left side ribs were fractured.
 - f. There was a hole through the left lung with massive bleeding.
 - g. The heart was shattered.
 - h. The other systems were normal.
6. In his opinion, the cause of death was excessive bleeding due to gunshot injuries. He confirmed to have issued the burial permit number REF1158300 and produced the postmortem form as PEX-1.
7. PW 1 further testified that on the same day being 9th July 2018, he performed a postmortem on the body of Stephen Wachira Mureithi, who had died of gunshot wounds. He confirmed that the body was identified by Josphat Muwa and Richard Macharia. He made the following observations;
- a. African male 38 years old moderately long 182 cm in height. The body was frozen.
 - b. There was a 2cm bullet entry wound on the anterior side of the abdomen (front side)
 - c. The body was bleeding on manipulation.
 - d. There was a 4cm * 4cm exit wound at the front right pelvis.
 - e. Exit wound on the right genital region through the right iliac side of the pelvis to the testis.
 - f. There were multiple perforations on the small intestines and the large intestines.
 - g. The liver was injured, as well as the spleen.
 - h. There was blood in the abdominal cavity.
8. In his opinion, the cause of death was excessive bleeding due to gunshot injuries. He confirmed to have issued burial permit No. 7108323 and produced the postmortem report PEX-2.
9. PW2 Robert Mwangi Kamau, testified that he was a businessman who lives in Ndinduruku village in Tebere location. He operated a complex shopping mall, which had a shop, a butchery, hardware and a bar and that he lived within the complex shopping mall. His wife Margaret Wanjiku Mwangi helped him to run the said business. That on 1st July 2018 at about 6.00pm, he heard screams from the frontside of the shops. It was his testimony that he tried to ran out of the house to see what was happening, but heard gunshots and met his daughter Lilian Wangui at the door, running towards the house from outside. Lilian told him not to go out of the house because they were being attacked by thugs. At that point more gunshots rung and from inside his house, he peeped through the ventilation of the sitting room door to see what was happening in the shop.
10. He stated that he saw the 3rd appellant armed with a knife, while the 2nd appellant armed with a pistol. He also identified the 4th appellant (a man in a blue jacket), as the robber who was pushing his wife Margaret Wanjiku Mwangi with the assistance of the 2nd appellant. He further testified that the 3rd appellant was demanding money from his wife and that he could see them clearly with the help of the security bulbs in the shop. It was his testimony that his wife was pleading the accused persons not to kill her, while the 1st appellant was standing outside as a security man for the robbers. He could see clearly as there were 6 electricity bulbs that lit the shop where the robbery was happening.



11. PW2 further stated that he knew the appellants well by name as they were persons known to him. Accused 1 (2nd appellant) was Ndambiri, Accused 2 (4th appellant) was Gachoki, while Accused 4 (3rd appellant) was known Bundi. He did not know the 3rd accused person (1st appellant) by name, but he knew him as he was a frequent customer at his shops and resided within a Kiumbu. It was his further testimony that he saw the 1st appellant carrying a gun and he kept on entering the shop and walking outside. He properly identified the 1st appellant when he entered the shop and approached the door to the sitting room, where they were. When he saw him approach, him and his daughter ran and hid inside the toilet. He stated that he heard more gunshots and that after the gunshots stopped, they waited for a while, before they came out of the toilet only to find that his wife had been shot dead in the shop.
12. PW2 further stated that they also found Kelly Wawira at the butchery floor groaning as she had been shot. They took her and the body of his wife to Karira hospital and that it was while at the hospital that he heard that Stephen Mureithi who was his employee at the shop had also been shot and he died while undergoing treatment. He also got information that his brother James Kimani was also shot and was also hospitalized due to injuries sustained from gunshot wounds.
13. All proceeds from the bar and shop amounting to Ksh.370,000/= which included Kshs.200,000/= he had intended to buy cattle with were all stolen as the cash drawer was not lockable. The robbers even took coins that were therein. The police came to the scene, took photographs and recorded their statements. He confirmed to have written his statement on 8th July 2018. Further, PW2 confirmed to have attended the identification parade and that he had identified the 2nd, 4th and 1st appellants at the identification parade which had over 20 people. He had seen the appellants clearly on the night of the robbery. On 23rd April 2019, he was called for another identification parade and that he had pointed out the 3rd appellant in a parade, which had over 10 people. PW2 further testified that he had attended the postmortem for his wife and Stephen Mureithi and identified them. He further stated that Kelly Wawira and James Kimani survived the gunshot wounds.
14. Upon cross-examination by counsel for the appellants, he confirmed that the door was about five feet high and that he did not step on anything to see through the ventilation. He clearly saw the 3rd appellant while he was in the shop and all the appellants were known to him as they all lived within Kiumbu. That he was under immense sadness and he did not give out the names of the accused persons initially but while he was writing his statement he did so. At this stage the counsel for the appellants applied for the court to visit the scene of crime before the witness could be further cross examined.
15. On further cross-examination at the scene, he stated that he constructed the house in 1998 and that they would do repairs yearly though they had never repainted or repaired the doors for over three years. He further stated that they did not modify the door while the criminal case was pending. He pointed to the ventilation through which he saw the accused persons (points to a ventilation on top of the door- while above the door there was also another ventilation). He also confirmed that the paint was not fresh and the police photographed the scene. PW2 re-confirmed that he did not do any renovation after the robbery incident and that it is possible to see what is happening in the shop through that ventilation (court confirmed that one can clearly see through the ventilation- which was on the door).
16. On further examination, he confirmed that 1st appellant had a gun, the 3rd appellant had a knife, the 2nd appellant had a pistol and that the 4th appellant was pushing his wife, though not armed. He further stated that it was the 1st appellant who shot his wife dead, while the 2nd appellant shot Stephen Mureithi. He confirmed to have made a report to the police wherein he had stated that the accused persons had an AK-47 rifle and saw what they did. He further confirmed that only the 1st appellant who was not



known to him before the robbery and he could not recall the clothes the accused persons were wearing nor did he see the getaway motor cycles. The robbery incident took about 25-30 minutes.

17. PW2 also confirmed to have attended two identification parades. In the first identification parade, he identified the 4th, 2nd and 1st appellants respectively. Whereas in the 2nd identification parade, he identified the 3rd appellant. He did confirm that members of the parade were between 25-30 and that he had picked out the 2nd, 4th and 1st appellant respectively from the same parade and he could remember the positions each accused was standing.
18. PW3 Murungi Lilian Wangui, stated that she was an accountancy student at Thika Institute. On 1st July 2018 at about 8:30 pm, she was seated outside their shop with her sister, when her mother told her to go into the house to cook. She went to the kitchen and started cooking but after about thirty minutes or so, she had heard noises and went to the butchery to see what was happening. She met the 1st appellant outside the shop. She could also see a man holding her mother by the neck and that she stared at the 1st appellant for about 30 minutes during the incident. She also saw the late Stephen Muriithi Wachira come out of the bar and he grabbed the gun which the 1st appellant had. As they were struggling, one of the robbers came out of the shop and shot him face down. The 1st appellant also subsequently pumped more bullets into the said Stephen Muritthi Wachira using his AK-47.
19. Taking advantage of the melee, she ran back to the house through the butchery. One of the robbers shot at her but luckily the bullet crossed over her. She met with PW 2 as he was going out and held him back as they scrambled into the sitting room to get away from danger. She told her father that there were thugs and he looked through the door ventilation to see what was happening.
20. The robbers demanded Ksh.1,000,000/= from her mother and she gave them all the money she had. There was ample light to identify the robbers as there were 4 bulbs in the shop and she also noted that the 1st appellant was wearing a black Marvin. As the robbery progressed, they ran with PW 2 and locked themselves in the bathroom. After things quiet down, they went out to search for her mother, whom they unfortunately found to have succumbed to gunshot wounds while inside the shop. Stephen too had also died from gunshot wounds. Her uncle Kimani too was shot but he had survived. She also confirmed not to have identified any other robber apart from the 1st appellant.
21. In cross-examination, she confirmed that Pato was operating the butchery and that she had seen the 1st appellant removing a gun from the sack. She also confirmed not to have known the 1st appellant before the incident but noted that he was wearing a black marvin and a black jacket. Her deceased mother was at the grocery stall situated at the shop's verandah and that she (her mother) was also in charge of the shop. She confirmed that Mureithi, who was their employee at the shop had grabbed the 1st appellant's gun and was shot on the right hand. Further another robber came from the shop and fatally shot Mureithi. She also confirmed to have seen 1st appellant for the first time in court after the incident but could remember his face and did not see Kelly Wawira during the robbery incident.
22. PW 4 Kelly Wawira Kirigu, testified that she was employed by PW2 and worked as a saleslady at his club Blue Line club. On 1st July 2018 at about 8.00 pm, she was selling in the club and came to buy milk from Margaret wanjiku before returning to the club. After a short while, she heard a stone hit the iron sheets of the club. She came out and found a man holding Margaret Wanjiru by hand and pulling her into the shop, while Stephen Muriethi was lying in front of the shop. She ran towards Margaret Wanjiru, but was shot from the front with the bullet exiting at her back. She fell down but managed to drag herself into the kitchen where she lay down as the robbery progressed. Later she was rescued and taken to hospital where she was admitted for treatment for one month. She produced her P3 form as MFI-P3. She also confirmed that Stephen Mureithi and Margaret Wanjiru had died after being shot



- by the robbers. In cross-examination, she confirmed that the club was operational and that did not see PW3 or PW2 as she came out of the club, but heard many gunshots. She did not identify any of the robbers.
23. PW 5 James Kimani Kamau, testified that on 1st July 2018 he was at his house next to PW2 shop and decided go to the shop to buy cigarettes. While at the shop they were attacked by robbers, and as he ran away, he was shot on the right leg and fell down. He lost consciousness and regained consciousness at the hospital, where he got the sad news that his sister in law had succumbed to gunshot wounds. He did produce his P3 form as MFI-4. On cross-examination, PW5 stated that he lost consciousness and he did not see any of the robbers.
 24. PW 6 Eunice Nyawira testified that on 6th July 2018, the wife of Bundi- 3rd Appellant, (who she identified on the dock) known as Joy came to her house and asked her to keep a bag for her. (Green canvas bag, PMFI-5). She agreed to keep it and started washing her clothes. One of her neighbors informed her that there were police officers at the 3rd appellant's house and perhaps they were looking for the said bag. Shocked by the said revelation, she decided to return the bag back to Joy and continued washing clothes. When the policemen came, she told them that she had given the bag back to Joy. The police searched for the bag in vain until Joy pointed outside the house where they recovered the bag. Therein they recovered money, ID cards and books. She confirmed that there was Kshs. 26,000/= in 1000 notes marked as PMF1-7, a book marked as PMFI-6, and a wallet with several ID cards marked PMF-8. She confirmed to have signed the inventory at the house the 3rd appellant. She also confirmed she and the 3rd appellant were tenants within the same premises and that she did not have any grudge against the said 3rd appellant. On cross-examination, she stated that she did not see any of the accused persons on that day when the bag was recovered and that it was the police who recovered the money, the Identity cards and the books.
 25. PW 7 No. 63288 Corporal Paul Mwambere, testified that he was attached to DCI Mwea East and he was the investigating officer. On 1st July 2018 he was the duty officer, when at 2100 hours he received a call from a member of the public informing him that there were gunshots at Ndindiruku village. He rushed to the scene with other police officers where they found the following casualties: Margaret Wanjiku Mwangi, Stephen Mureithi Wachira, Kelly Kawira & Stephen Kimani. He stated that the casualties were taken to Karira hospital by members of the public and they followed them. On arrival he found out that Margaret Wanjiku and Stephen Wachira had been pronounced dead on arrival, but Kelly Kawira was admitted in serious condition. James Kimani too had was admitted in Mwea Medical hospital in fair condition. He confirmed to have interviewed PW2 who told him that he identified, the 2nd, 4th and 3rd appellant's as being the persons who robbed him.
 26. PW7 further testified that with the help of informers, he arrested the three appellants except the 3rd appellant who had escaped. He also stated that PW6-Eunice had told him that the wife to the 3rd appellant had given her a bag to keep but that she had returned the same to her. He identified the bag to the court, being PMPI-3 which contained a book and Kshs.26,000/= in Kshs.1000 denomination. He produced the bag and the said items in the bag as Exhibits P5 -P9. Further PW7 testified that he conducted an identification parade for all the appellants and produced the identification parade forms as Exhibits P10(a) to P10(d). He also recovered 8 spent cartridges which were with the ballistic experts. The findings of his investigations was that, it was the 4 appellants, who robbed the deceased of KSh.200,000/=, shot her twice in the chest and also shot three other people at the scene. His instigations also revealed that it was the 1st appellant who had the gun and he was eventually arrested by Corporal Mutuku.



27. In cross-examination PW7 stated that that he charged the accused persons with robbery with violence based on his investigation. He had met PW2 immediately after the robbery and he was traumatized but gave him the names of the accused persons on the same day. He confirmed that in Corporal Mutuku statement, the said officer had confirmed that they were looking for two suspects, whom had been profiled. The 2nd and 4th appellants were arrested within Kiumbu and he reiterated that PW2 had identified the appellants clearly during the said robbery, especially the 1st appellant who was carrying the AK-47 rifle. PW2 saw their assailant's, when he peeped through the ventilation which was on top of the door. He had also interrogated Joy Wanjiku Mumbi, the wife to the 3rd appellant and she did disclose to him that the said 3rd appellant had ran away.

C.Evidence by the Defence

28. DW1 Isaac Kariuki Ndambiri, testified that on 1st July 2018, he woke up, took breakfast with his family before heading to the farm. It was his testimony that he harvested 10 Kgs of Miraa which he took to Kagio market and sold the said miraa up to 8.00 pm. He eventually slept at Kagio market and returned home on 2nd July 2018. On 7th July 2018, he harvested more miraa and later in the evening had gone to Homeboys club for some beer when unknown people came to the club and called his name, handcuffed him and took him to his home. They conducted a search, picked his phone, and he was later taken to Wang'uru Police station where he was booked and held in the the cells without being told why he was arrested. On 8th July 2018, he was taken for an identification parade, where 4 people came to participate in the said parade. While he was at the line, PW2 who was known to him identified him. DW1 confirmed that PW2 had a shop, bar and butchery in Kiumbu where he used to visit but denied committing the robbery. He also produced a copy of the investigation's diary, marked as DEXH-1 which showed that PW2 did not identify him at the scene. On cross-examination, he stated that there was no one who could testify as to where he was on the evening of the robbery. He had rented a house in Kagio and had no grudge against PW2. He confirmed that PW2 was a person he knew.
29. DW2 Kennedy Gachoki Kanguru, testified that he was a businessman and a farmer who lived in Kiumbu. On 1st July 2018, he woke up and started his daily chores. Later in the evening at 5.00 pm, he took milk for sale at Kiumbu market and returned home for supper, which had been prepared by his wife, ate and slept. He further stated that on 6th July 2018, he was at his house when he was arrested by 3 police officers who searched his house and found nothing. They took him to Wang'uru police station where he was locked up. On 8th July 2018, he attended an identification parade comprised of 9 people and that only PW2 identified him as he was his schoolmate and when they were growing up they used to herd cattle together. He denied committing any robbery and came to know of the said allegation on 9th July 2018, when charged in court. In cross-examination, he stated that on 1st July 2018 he was at home with his wife, but he would not call his wife as his witness. God was his witness. He also confirmed that he had no grudge against PW2.
30. DW3 James Gitonga Wawira, stated that he was a motor vehicle driver and bodaboda operator under class BCE. On 1st July 2018, he was requested by Peter alias Emmanueli, to drive motor vehicle Registration Number KAW 561G to Nyandarua, specifically to Kasuku town centre. He he woke up at 3.30 am and started his journey to Kasuku. Later enroute back, they decided to stop at Olkalau and Tumaini, to pick sacks of potatoes. Once done, they started the journey back to Kutus at 1.30 pm and arrived at 3:30 am on 2nd July 2018. He confirmed to have then taken the lorry to Kutus market where it was offloaded and he took the vehicle back to Emmanueli who told him to park the lorry at the market. Thereafter he went to sleep and the following day went to see a woman who paid him Ksh.13,000/= for the trip, his cut for his labour was Ksh.1500/= and the rest for the lorry. The same evening police officers from Kutus patrol came and arrested him. They searched him took Ksh.11,500/



- =, his phone then took him to Wang'uru police station. On 3rd July 2018 he was taken to court and the police requested that he be held in custody for one week pending investigations which prayer was granted. It was his testimony that the police took his pictures on 6th and 8th July 2018.
31. DW3 further stated that PC Kibagendi requested him to attend an identification parade where all the other participants were tall except him. 4 people came to the identification parade and PW 2 pointed towards his direction but it was not clear whether it was him he identified. DW3 denied committing the robbery as his first day at Ndindiriku was on 5th February 2020 (during court visit). He further punched holes in the evidence of PW3 who had testified that she met one of the robbers and stared at him for over 30 minutes. In her statement she did not indicate so. He also referred the court to the statement by Patrick Sanga Mutisya who was never called as a witness, wherein he had stated that the person (robber) had mask and hood. He also produced both statements of the said witness and Patrick Sanga Mutisya as Exhibit D3 & D4. Further he also produced into evidence the statement and photographs of the scene of crime officer as exhibit 5(a) –(d). According the DW3, the pictures did not show a ventilation above the door.
 32. In cross examination the witness stated that on 01.07.2018, he was at Tumaini in Nyandarua county. He was with one Waweru and his five loaders. He would not call the said Waweru as witness nor would he call Emmanueli. On 05.02.2020, when they went to the scene of the incident, he saw the ventilation above the door.
 33. DW4 Christopher Bundi Mbogo, testified that he was an expert in horticulture and also operates a retail shop, which had an Mpesa agency at Kiumbu center. On the 01.07. 2018, he woke up in the morning and went to church at 9.30 am to 3.30 pm. After lunch, he went back home and opened his shop. It was his testimony that his sister came, they spoke for a while and at 9.00 pm his sister went away. He then retired to sleep at 10.00 pm. On 4th July 2018, he was called by his friend, who requested him to travel to Nairobi for a job offer. He did so and upon meeting, his friend requested him prepare to go to Mpeketoni for a horticultural Job. He took up the offer and proceeded to Mpeketoni where he arrived on 6th July 2018. Along the way he lost his phone, I.D and money.
 34. He did not find the person he was supposed to meet in Mpeketoni because he did not have his phone but they later met and was taken to the shamba. He confirmed to have then called his wife on her phone, and was informed that on 5th July 2018, policemen had gone to his house, did a search, and took his money amounting to Ksh. 26,000/=, a “chama” book for Kiumbu Youth Group and his wallet that contained valid documents. DW4 stayed at Mpeketoni until 20th July 2018 when he returned to Kirinyaga and found that his wife had deserted their home. On 23.04. 2019, he went to Kutus and was arrested by the police, who then transferred him to Wang'uru police station. He was thereafter arraigned in court. He confirmed to know PW2 and that his sister was married by PW2, cousin and were blessed with children one of whom was PW3.
 35. In cross examination, DW4 stated that his sister Joan Njeri could verify his whereabouts but that he would not call his wife as a witness. He then averred that he had gone to Mepeketoni on 5th July 2018, where he had a verbal contract to take care of crops, but he could not remember the lodging where he had slept and that he had no witness to show he was in Mpeketoni. He also confirmed that on 21st April 2019 he returned to Mwea and had not seen his family since 2018. He further testified that he had no grudge against PW2. On re-examination, he stated that KSh.26,000/= was taken from his house and that he did not see any reason to ask the police why they took the money.
 36. DW5 Joan Njeri Muthie, testified that she knew DW4, who was her brother. DW1 who was her neighbor, While DW2 was her uncle. That on 1st July 2018 at 8.10 pm, she went to DW4 shop and stayed with him up to 9.05 pm when she went to her home. On cross-examination, she reiterated that



she was with DW4 and before going to see him, had initially closed her shop between 7:30-8.00 p.m for she had to arrange various items therein before closing. She also stated that DW4 was alone in the shop.

37. The trial magistrate did consider all the evidence adduced before court and proceeded to convict all the appellants. Upon considering the appellants mitigation and victim impact statement, the trial court sentenced all the appellants to suffer death by hanging by dint of section 296(2) of the penal code.
38. This Appeal was canvassed by way of submissions.

Submissions by the Appellants

39. The Appellants did file submissions in support of their case on 18th January 2023. They submitted that the ingredients of section 295 as read together with section 296 (2) of the Penal Code were not satisfied in the lower court. On the evidence adduced, the Appellants challenged the mode of their arrest, in that the complainant who had mentioned the accused persons had not participated in their arrest. Further, they argued that the identification parade forms were produced by the investigation officer yet a different officer conducted the parade. The forms were hence not properly on record and ought to be expunged. They also argued that even if the forms were to be found as being properly on record, the identification in itself was illegal, null and void. Their argument was premised on the fact that the investigation officer admitted that the same members of the parade were used to identify all the accused persons.
40. The Appellants also pointed out that when the court visited the scene of the incident, the Complainant showed the court an open space at the top of the door, which cannot be the same as ventilation which was in the wall above the door. The photograph's in question (Exhibit D5) showed that the door had no gap at the top, while when the court visited the scene, the door had a gap which was a clear indication that the door had been tampered with. They argued that when the photographs were taken, there was no space above the door but when the court visited the scene, the door had a gap, indicating that new evidence was added. They also argued that if the complainant knew the names and residences of accused 1,2 and 4, he would just have told the police their residences to enable the police swing into action immediately. They questioned why the police did not arrest the known accused persons immediately yet it was claimed their names were given at the scene.
41. It was also submitted that the first incident report recorded on the date of the incidence does not indicate that the perpetrators were known, hence the trial magistrate ought not to have casually justified the omission as she did on page 21 line 1 and 12 of the judgement. They argued that it cannot be coincidental that the Complainant remembered the names of the robbers and the same recorded when he wrote his statement 4 days later. If indeed PW2 and PW3 identified the accused persons as they have claimed, the identification parade ought to have been conducted pronto and the suspects arraigned in court immediately, with substantive charges. They also highlighted that at no point did PW3 state that she could identify the robbers and that her sensational identification of 1st appellant ought to be treated with a lot of suspicion. The appellants also submitted that there was no forensic evidence connecting the accused persons to the offence yet their cellphones were seized.
42. On the law, the Appellants identified two areas for consideration;
 - a. Identification and placing the suspects at the scene of crime
 - b. Dock identification of the suspects in court by Lilian Wangu
43. It was their contention that an identification parade is only necessary when a potential witness has informed the investigators that he had seen the perpetrators of a given crime and given a chance, he would be able to identify them. It was their view that the Investigating officer then ought to have



organized a group of at least 8 members who should be of near size, age, gender and complexion as nearly as possible as that of the suspect. The facts of this case did show that this was not done and the whole identification parade was a charade.

44. The evidence of the complainant cannot be said to have been corroborated by that of his daughter, PW3. They argued that the evidence of PW3 was basically dock identification and at no any point did she tell the police that she could identify the suspects, and that she admitted in cross examination that she identified 1st appellant in court. It should also be noted that PW3, had stated that she could not identify any of the accused persons since they were wearing marvins. They faulted the trial magistrate for finding that PW3 might have earlier been confused by the court set up, citing that she had taken oath as an adult and did not strike as someone in need of any special attention.
45. The appellants also faulted the trial magistrate for summarily dismissing the defence fronted by the accused persons, the trial magistrate demonstrated a pretrial mindset that the accused persons had committed the offence. They also faulted the trial court for failing to appreciate that the star witness, PW2, in his statement to the police had claimed to have identified the suspects through a ventilation but what he showed the court was an opening or gap, not a ventilation. They also raised that fact that they had showed signs that the indicated gap had been recently created but that the court had ignored, even when there were signs that the same had been recently painted. They also argued that the Complainant could not have seen the robbery incident while standing on nothing, since the opening was at a height of seven feet whereas the complainant was barely five feet tall.
46. In conclusion, they invited the court to find that the evidence against the accused persons was manufactured to fit the bill and fix the accused persons who were 'known criminals' yet the circumstances surrounding the commission of the heinous offence could not allow for a positive identification. They also highlighted that all the perpetrators wore marvins and had their faces covered as per the evidence of PW3 and Patrick Sanga Mutisya who had recorded a statement but was never called to testify. They also urged the court to hold that dock identification cannot be said to corroborate an identification parade which in itself has been conducted in an illegal manner.
47. The appellants placed reliance on the case of David Mwita Wanja & 2 Others vs Republic where it was held that the evidence adduced on the identification of the suspects was found to be useless as during the two parades, since the same members were used. They also cited the case of Michael Kimani Kunga vs Republic Criminal Appeal No.686 of 2010 where the court held that a trial court must be very cautious when dealing with one witness evidence.

D. Analysis and determination

48. 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 demeanour. 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”.

49. Further this being first Appellate Court, it must itself also weigh conflicting evidence and draw its own conclusion as discussed in (Shantilal M. Ruwala-Vrs-R (1975) EA 57.

“Where it was stated that it is not the function of the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower Court finding and conclusion, it must make its own findings and draw its own conclusions only then can it decide whether the magistrate’s findings should be supported in doing so, it should make allowance for the fact that the trial Court has made the advantage of hearing and seeing the witnesses.

50. 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.”

51. 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. Whether the trial court failed to consider the appellant’s Defence presented during trial.
 - d. If the sentence melted out was harsh and excessive.

Burden of Proof

52. 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.”



53. 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 Appellants to the required legal standard.

54. 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.”

55. 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.”



56. 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.”

57. 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.

58. The evidence adduced did prove that on the early night of 1st July 2018, PW2 & PW3 were violent confronted by armed robbers, while within PW2’s business complex at Ndindiruku, in Mwea East, within Kirinyaga county. During the robbery incident Margaret Wanjiku Mwangi and Stephen Muriithi Wachira were shot dead in cold blood, while Kelly Kawira Kirigu and James Kimani Kamau too were shot and critically injured. The robbers stole approximately Ksh 370,000/= from PW2 and his deceased wife, and in the process undoubtedly used extreme violence. PW4, PW5 and PW7 also did confirm the indeed a robbery did occur and various recovered items were produced as exhibits, including the P3 forms of PW4 and PW5. The offence of robbery with violence was undoubtedly proved.

59. Having confirmed that indeed an incident of robbery with violence had occurred, the next question in this appeal which remains for determination is whether the witnesses properly identified the 1st to 4th appellants as being amongst those who robbed them on the night of 1st July 2018 and as to whether the identification parade carried out was proper.

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.

60. The key witnesses with regard to identification were PW2 and PW3, who in their testimony did state that they identified the appellants and later PW7 conducted an identification parade on 08.07.2018 where PW2 identified the 2nd, 4th and 1st accused and the second identification parade was carried out on 23.04.2019, where he identified the 3rd appellant. For the court to uphold, the identification parade findings, it is mandatory that it must be conducted strictly in compliance the regulations of the police force standing orders before the process can be upheld. See *Simon Kihinya Kairui and another versus Republic*, *Republic versus Mwengo S/O Monaa* and *SSentale versus Uganda*.

61. The Court of Appeal in *Samuel Kilonzo Musau v Republic* did state that : -

“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.”

62. PW7 Corporal Paul Mwambere, who was the investigating officer did testify that, “For each accused, I conducted an identification parade.” The said witness was a corporal in rank, and by dint of regulation in the police standing orders he could not conduct any identification parade as he was not of the rank of a Police Inspector and above. Secondly evidence presented as to how the said identification parade were conducted were scanty and incoherent and clearly pointed to a process which was not done above board. Such evidence cannot be relied upon and did not meet the standard set out in law for holding such parade.
63. As regards identification PW2 was categorical that he personally knew the 2nd, 4th and 3rd appellants by name and indeed positively identified them as persons who took part in the robbery. During his evidence in chief PW2 called them all out by their individual names. Further he did not know the 1st appellant by name, but he was a person he knew. He was a short man who frequently did visit his shop. He was sure he saw him too during the robbery incident as he was the one who had the AK-47 Rifle and stood guard as the robbery went on. He kept on entering the shop and coming out and was the one, who approached the door to his sitting room and eventually fatally shot Margaret Wanjiku Mwangi.
64. PW2 described in detail how he saw the appellants and what they did during the robbery incident, which took approximately 30 minutes. He stated that the shop complex had six security lights lit and observed the incident from a ventilation above the door. The 3rd appellant was armed with a knife, while the 2nd appellant was armed with a pistol. The 4th appellant had a blue jacket, and was the one pushing the deceased Margaret Wanjiru Mwangi while demanding for money and he was assisted by the 2nd appellant. In cross examination PW2 did state that, “The accused are known to me. They live in Kiambu. I reported to the police..... I had told the police the names of the accused before they were arrested”.
65. At the request of counsel for the appellants, the court did visit and held further cross examination at the scene of the incident and PW2 did clarify that the ventilation above the door, were the spaces on the top part of the door, which door he described as being about five feet in height. There was also the normal ventilation which was above the door. It was his evidence that one could clearly see the shop through the door ventilation, and this fact was confirmed by the court, which noted that, (court confirms that one can clearly see through the ventilation). PW2 denied modifying the door during pendency of the trial and also confirmed that initially when he reported incident he did not tell the police the names of the appellant’s as he was under immense stress but eventually told the investigating officer the appellants names before they were arrested.
66. PW3 on the other hand testified that while at the kitchen she heard commotion outside and went to check what was happening. She meet the 1st appellant and faced him and/or was in his presence for about 30 minutes, he was wearing a black Marvin. She saw one of the robbers hold her mother by the neck, and a saw Stephen Mureithi come from the bar. He grabbed the big gun, which the 1st appellant was holding and a struggle ensued. One of the robbers came from the shop and shot him face down. It was at this point that she took advantage of the melee and ran to the back to the house through the



butchery. She was shot at once and was lucky as the bullet whizzed over her head. She also testified that there was ample light at the complex from four security bulbs.

67. In cross examination PW3 stated that she saw the 1st appellant remove a gun from a sack and had not known him before the day of the robbery incident. He had a black Marvin and black jacket, and was she came face to face with the said 1st appellant. In court she did testify that, “I saw accused 3 in court when I attended court for the first time because I could remember the face of accused three. I informed the CID when I saw accused 3 in court.”
68. 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.
69. 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.
70. The second category is Recognition Evidence, which is evidence from a witness that says 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.
71. 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*.
72. 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.
73. The evidence of PW3 was not reliable and identified the 1st appellant in court. During the robbery incident she said that she faced him for 30 minutes before she stopped looking at him and that after one hour, she saw the late Stephen Mureithi come from the bar and tackle the 1st appellant, but unfortunately was shot dead, by one of the other robbers. Obviously, the time period referred to was also not accurate and the witness evidence must have been clouded by her shock and trauma of the incident. Dock identification has also been discounted as unreliable. See *Gabriel Kamau Njoroge Vs*



Republic (1982-1988) 1KAR 1143 , & Nathan Kamau Mugwe Vrs Republic criminal Appeal No 63 of 2008.

74. That leaves only the evidence of PW2. The case law is that the court can convict on the basis of the evidence of a single witness, if it believes that the evidence of the said witness is trustworthy. All the court is required to do is to warn itself of the dangers of convicting on the evidence of a single witness and can convict if it is fully satisfied that the evidence points to the culpability of the accused.

75. The court of appeal in Chila Vrs Republic (1967) E.A 722 did articulate this position and held that;

“The judge should warn himself of the danger of acting on uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given the conviction will be set aside unless the court is satisfied that there has been no failure of justice.”

76. In Wamugunda Vs Republic (1989)KLR 424 at page 424 the court had this to say.

“where only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely Make it the basis of a conviction.”

77. In Nzaro Vs Republic (1991) KAR 212 Hancox CJ, Gachuhi and Cockar JJA held that

- i. Before accepting visual identification as a basis for conviction, the court had a duty to warn itself of the inherent dangers of such evidence.
- ii. A careful direction regarding the conditions prevailing at the time of the identification and the length of time for which the witness had the accused person under observation, together with the need to exclude the possibility of error, was essential.”

78. Having looked at the case law and acknowledging the danger of convicting an accused person, based on the evidence of a single witness, I do find that the evidence of PW2 was truthful and he did give an accurate account of what transpired during the robbery. The key aspect of his evidence was taken during a visit of the locus in quo by the court. The appellants put forth argument's that PW2 could not have seen, what transpired from the ventilation he alluded to and in the alternative did suggest that, he tampered with the door to create the said ventilation to support his evidence after the trial had commenced. The trial court during the visit to the scene did note in its proceedings that the door had a space through which one could see the shop. In its judgment (at page 19), the trial Magistrate did note that;

“The court saw the ventilation that PW2 used to identify the accused. indeed, one could see clearly what was happening in the shop from the sitting room through the ventilation. Mr Nduku suggested in his cross examination that the ventilation was not there at the time of the robbery and had been fixed recently but PW2 was steady fast in his testimony and maintained that the ventilation was always there. The court did not see any evidence that the ventilation was recently fixed. It had old paint as the rest of the wall.

79. The observation by the court during the visit of the locus in quo did corroborate the crucial evidence that from PW2 sitting room, when one was peeping through the ventilation on the door, so to speak,



he/she had a clear view of what was transpiring at the shop. Secondly PW2 was categorical that he personally knew the 2nd, 4th and 3rd appellants by name and indeed positively identified them as persons who took part in the robbery. They were person who resided within Kiumbi. He also saw, the 1st appellant and described at length his actions while holding the AK 47 Rifle. The 1st appellant also had walked directly towards his sitting room door and he and PW3 scrambled and hid in the bathroom. The 1st appellant though not known to him by name, was a frequent customer at his shops and was a person he recognized and was the robber who fatally shot his wife.

80. The 2nd, 4th and 3rd appellant all in Defence did confirm that they resided with Kiumbi. The 2nd appellant in his defence confirmed that he knew PW2 and it was also within his knowledge that he owned the shopping complex in Kiumbi. The 4th appellant acknowledged that PW2 was his schoolmate and when they were young, they would graze cows together. The 3rd appellant also did acknowledge that PW2 was known to him and further they were related. PW2 sister was married to his cousin and they had children one of whom was PW3. The parties were thus well known to each other and there was no grudge which existed amongst them nor was there allegation that PW2 wanted to wrongfully fix them.
81. This robbery incident occurred during a period of about 15- 30mins, which was more than adequate time for PW2 to be able to identify the robbers. PW2 was within his house and away from imminent danger and while the circumstances were stressful, he had the opportunity to observe what was going on. Undoubtedly, he had a long clear, unobstructed view of what transpired and recognized the robbers as they were people he personally knew and for the 1st appellant was a person he was acquainted to, being one who would frequent his shopping complex.
82. No doubt the shopping complex was well light with six security lights and the distance from his observation point, while not described was “within meters” as the house was within the business complex. Further even though on the very night of the incident PW2 did not describe the robbers to the police, he testified that that was so because he was under emotional turmoil as he had lost his wife under gruesome circumstances. But he later wrote his statement and revealed what he knew and identified the assailants. All the appellants were thus positively identified as the perpetrators of this heinous crime and the trial magistrate cannot be faulted for so finding.
83. The appellants also did raise the issue that one crucial witness, police officer Patrick Sanga Mutisya, was not call and had indicated in his statement that the robbers were wearing Marvin and masks. PW3 also allude to the fact that the 1st appellant was wearing a Marvin. The said police officer who was not called was not at the scene of the robbery when it happened. Secondly only PW3 testified that the 1st appellant wore a black Marvin and black jacket. A Marvin is a woollen hat, so to speak and does not cover the face. All other witnesses who were at the scene did not see any of the assailants were any mask.

Whether the trial court failed to consider the appellant’s Defence presented during trial.

84. The trial court in her judgment at pages 12 – 18 did outline the appellants evidence as adduced during trial and thereafter at pages 23-27 did consider the same and gave cogent reason as to why he discounted their evidence vis a vis the prosecution evidence. The appellant’s submission that he did not consider the same therefore has no basis and is dismissed.

If the sentence melted out was harsh and excessive

85. Sentencing is a discretion of the court. But the court should look at the facts and the circumstances of the case in its entirety so as to arrive at appropriate sentence. After conviction, the trial court did call for a pre-sentence report. He considered the same and also considered the mitigation of the appellants. The court also considered the victim impact evidence of PW2 and PW3. They were gravely affected



by the robbery incident. Two persons lost their lives, while PW3 injury to her back left her partially maimed and she could not bend. PW2 had to close his business and was still grieving the loss of his wife. The court took into consideration all these factors and sentence the appellants to suffer death as provided under section 292(2) of the penal code.

86. This court is guided by the principles in the court of Appeal case of Bernard Kimani Gacheru vrs Republic (2002) eKlr. Where it was stated;

“It is now settled law, following several authorities by this court and by the high court, that sentence is a matter which rests in the discretion of the trial court. Similarly, sentencing must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case or that the trial court overlooked some material factor or took into account some wrong material or acted on a wrong principal. Even if the appellate court feels that the sentence is heavy and that the appellate court might have itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless any of the matters above are shown to exist.

87. The Court of Appeal Thomas Mwambu Wenyi Vs Republic (2017) eKLR cited the decision of the Supreme Court of India in Alister Anthony Pereira Vs State of Maharashtra at paragraph 70-71 where the court held the following on sentencing:

“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.

88. 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.

89. 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 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.....”

90. 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.”

Disposition

91. Flowing from my analysis and conclusions on all the issue discussed. It is my finding that the trial Court did not misdirect itself in returning and verdict of guilty. The appeal as filed against conviction by the appellants is thus not merited and the same is dismissed.

92. 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 sentencing all the appellants to serve a term of 50 years imprisonment. The sentence will run from the dates of arrest of the appellants (01.07.2018, 06.07.2018, 07.07.2018 and 23.05.2019 as indicated in the charge sheet and in line with Section 333(2) of the CPC).

93. Right of Appeal 14 days.

94. It is so ordered.

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

4th Appellant

.....For O.D.P.P

.....Court Assistant

