**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BOMET**

**CRIMINAL APPEAL NO. 21 OF 2019 CONSOLIDATED WITH CRIMINAL APPEAL NO. E031 OF 2021**

*(From Original Conviction and Sentence of Hon. P. Achieng in the Principal Magistrate's Court at Bomet, Criminal Case Number. 677 of 2017.)*

**AARON KIPNG'ETICH BUNEI *alias* BLOCK.....1ST APPELLANT (2ND ACCUSED)**

**AND**

**ROBERT KORIR alias GILBERT KIPKURUI .....2ND APPELLANT (1ST ACCUSED)**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The Appellants in this case were jointly charged with the offence of Robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the charge were that on 21st day of July 2017 in Chemaner Location within Bomet County, jointly robbed Joseph Kipkirui Ketili of Kshs. 3000, one mobile phone make Kicka Smart phone valued at Kshs. 3999 and a wallet containing National Identity Card, ATM cards of Family Bank and Sacco Link amongst other personal documents and at the time of such robbery, wounded the said Joseph Kipkirui Ketili.

2. The 2nd Appellant (1st Accused) was also charged with an alternative Charge of Handling Stolen Goods contrary to Section 322(1) as read with Section 322(2) of the Penal Code. The particulars of the charge were that on the 22nd day of July 2017 in Chemaner Location within Bomet County, otherwise than in the course of stealing, dishonestly retained one mobile phone make Kicka Smart phone valued at Kshs. 3999, National Identity Card, ATM cards of Family Bank, Sacco Link, Voter's Card and a wallet containing personal documents of Joseph Kipkirui Ketili knowing or having reason to believe them to be stolen property.

3. The Appellants pleaded not guilty to the charges and the case proceeded to a full trial. The prosecution called ten (10) witnesses. A brief summary of the prosecution's case was that the two Appellants had met with the victim and his friend at a local bar where they shared drinks. Later that night, when the victim (PW1, Joseph Kipkirui Ketili) and his friend were on their way home at around midnight, they heard footsteps of people following them. They noticed that it was the two men who had shared drinks with them who then attacked them and stole from the victim while his friend ran away. The victim was rescued and taken to hospital. Later on the next day, the Appellants were confronted by the members of the public who managed to arrest them and recover the victim's items from the 2nd Appellant.

4. At the close of the Prosecution's case, the trial court found that the Appellants had a case to answer. They were both put on their defense and section 211(1) of the Criminal Procedure Code explained to them. They both elected to give unsworn evidence with no witnesses.

5. It was the 1st Appellant's defense that he was at work until 5.00 p.m. on the material day, that as a result of chest pains, he went to his house and slept until the next morning. That two people one of whom he had had prior disagreement with by the name Kiprotich, called him from his house. He then accompanied him thinking that he was going to repair a motorcycle at the garage, only to find a crowd of people who asked him to sit down next to his co-accused who had been tied up. At that point, Kiprotich, one of the men who had picked him from his house began to beat him saying that they had attacked and robbed another person. It was his testimony that he was rescued by the police and taken to Longisa County Hospital for treatment. Later, he was charged in court for the offence of robbery with violence.

6. The 2nd Appellant on the other hand stated in his defence that he was at Tergat village harvesting vegetables until 4.00p.m. That at 5.00 p.m. he got into a motorcyle and went home where he slept until 7.00 a.m the folowing morning. That the next morning, he got onto a motorcycle to Chemaner town where he was to deliver the vegetables. It was his testimony that the he stopped the motorcycle to go buy a sack in which he would put the vegetables as the motorcycle rider went to fuel. At that point, he was called by two people who began to beat him until he lost consciousness only to wake up at the hospital with the 1st Appellant (2nd Accused person).

7. By a judgment dated 18th June 2019, the Appellants were convicted of the offence of Robbery with Violence and sentenced to serve 15 years in prison. This forms the background of the present Appeal.

8. In his homemade Petition of Appeal filed on 2nd July 2013, the 1st Appellant raised 6 grounds restated verbatim as follows:

a) That he pleaded not guilty at the trial.

b) That the learned trial magistrate erred in fact and in law by convicting and sentencing him to serve 15 years' imprisonment without considering that the evidence produced by the Prosecution was not water tight to base the conviction and sentence *(sic)*.

c) That the trial magistrate erred in law and in fact by relying on the evidence of PW6 and PW7 of which their testimonies were not favourable at all *(sic)*.

d) That the trial magistrate further erred in law and in fact by determining that the case of Robbery with Violence was well proved beyond reasonable doubt without considering that there is no any *(sic)* exhibits which could implicate him with the said robbery with violence in question .

e) That the area chief testified about how I send him to collect my phone in my house and my phone is not related with the one belonging of the Complainant*(sic)*.

f) That he wished to be present during the Appeal.

9. The 1st Appellant then filed amended grounds of Appeal as follows:

a) That he pleaded not guilty at trial.

b) That the evidence of identification in the instant case was not conclusive to sustain a safe conviction.

c) That the exhibits availed in court did not directly link the Appellant to the offence as there was no inventory of the same.

d) That the prosecution case did not reach the required threshold required in criminal offences.

e) That the defence of the Appellant was rejected for no cogent reason.

10. The 2nd Appellant Robert Korir *alias* Gilbert Kipkurui (1st Accused) filed his Appeal through Criminal Appeal E031 of 2021 on 23rd September 2021. The 2nd Appellant raised 6 grounds of Appeal restated verbatim as follows:-

a) That he pleaded not guilty at the trial in the instant matter.

b) That the learned trial magistrate erred in points of law and fact by failing to observe that the purported visual identification was not carefully tested as to the inquiry of vital matters of evidence.

c) That the learned trial magistrate erred in points of law and fact by failing to note that the entire prosecution evidence was inconsistent and contradicted *(sic)* .

d) That the trial court in failing to find that some crucial witnesses mentioned by the Prosecution were not called to testify *(sic)*.

e) That the trial court erred in points of law and fact by failing to hold that the prosecution was not proved against the Appellant to the required threshold.

f) That the learned trial magistrate diregarded the defense of the Appellant without giving cogent reasons for the decsion to do so.

11. The two appeals were subsequently consolidated on 30th September 2021 on the directions of the Court with Aaron Kipng'etich Bunei being the 1st Appellant and Robert Korir *alias* Gilbert Kipkurui being the 2nd Appellant. The Appeal proceeded under file number Criminal Appeal No. 21 of 2019. It was both their prayers that the Appeal be allowed, the conviction quashed and the sentences set aside. The Court directed that the Appeal be canvassed through written submissions.

**1ST APPELLANT'S SUBMISSIONS**:

12. The 1st Appellant submitted that he pleaded not guilty and that the evidence of identification was not conclusive since the various witnesses gave different testimonies on the mode of lighting that they relied on. He also submitted that by the time the victim and PW2, Samwel Kipkemoi Maritim were leaving the bar at midnight, they must have been drunk since they begun drinking at 6.00 p.m. They relied on the cases of *Wamunga vs. Republic (1989) KLR 224; Turnbull vs. R. (1977) QB,224; Wang'ombe vs. Republic (1980) KLR, 149 at pg. 150; Robert Gitau Wanjiku vs. R. Criminal Appeal No. 63 of 1990; and R. vs. Bentley Thomas (1994), 99, Criminal Appeal No R. 342* . He also urged the court to consider the issue of intensity of light and proximity and relied on the case of *Moses Mwangi Kanyeki vs. R (2015)*

*eKLR.*

13. The 1st Appellant further submitted that the exhibits that were availed in court did not link him to the offence an it was no wonder that he was never charged with the alternative count of handling stolen property because none of the victim's items were found in his possession. He relied on *Mwangi vs. R (1974) 108.* He also raised issue with the fact that no inventory had been done. He relied on *section 19 of the Police Act, section 150 of the Evidence Act* and the cases of *Kinyatithi s/o Mwangi vs. R (1955) EACA 422* and *Jagai Singh vs. R (1963) EACA* in respect of the law of recent possession.

14. On the issue of proving the offence to the required threshold, he submitted that the prosecution failed to do so when they failed to link him to the exhibits recovered and when the witnesses failed to mention him as the person who assaulted the victim. He relied on the case of *Bater vs. Bater (1950) All ER, 458* to this end. He also intimated that he had had a prior disagreement with one of the witnesses.

15. Lastly, the 1st Appellant submitted that the trial magistrate rejected his evidence without cogent reasons and maintained that he was never present at the scene of crime, that he was unwell the previous night and woke up to go repair a motorcycle only to be accosted and attacked by the public as being one of the suspects who assaulted the victim. He stated that the trial magistrate did not give reasons for considering the prosecution's case as weightier than that of the defense. To this end, he relied on *Ouma vs. R (1986) eKLR, 619* and section 169 (1) of the Criminal Procedure Code.

**2ND APPELLANT'S SUBMISSIONS**:

16. The 2nd Appellant filed his submissions on 23rd September 2021 submitted in a similar manner that he pleaded not guilty to both the main and alternative charges. That the conditions at the time of the incident did not allow for a proper and unmistaken identification as required by the law and therefore the evidence adduced ought to have been carefully examined before being used to sustain a conviction. On this, he relied on *Weeder (1980) Cr. App No. 228, Eria Ssebwayo vs. R. (1993) Cr. App. No. 174, Charles O. Maitanyi vs. R. Cr. Appeal No. 6 of 1986* and *Turnbull vs. R (1977) QB, 224.*

17. Secondly, he submitted that the entire prosecution's evidence was marred with inconsitencies and contradictions. He stated that the discrepancy between the testimonies of PW1 and PW2 demonstrated that they were not truthful. Thus, their evidence ought not to have been relied upon and for this he cited the Court of Appeal case of *Dinkerai Rakrishan Pandya vs. R. (1957) EACA, L.R. 33.*

18. On the same breath he also submitted that the prosecution failed to present before court crucial witnesses who had been mentioned as part of the men who arrested the Appellants, which was a blow to their case. To this, they relied on the Court of Appeal case of *Bukenya vs. Republic (1972) EACA, 549*.

19. The 2nd Appellant submitted that the exhibits produced in court raised alot of questions since the blood stained clothes were never subjected to DNA testing to prove that the blood belonged to the victim and were also never linked to the Appellant. He relied on case of *Frospher Kandilida & Another vs. Republic Cr. App. No. 629 & 630 of 1990* and Peter Wekesa *& 4 Others vs. R. C.A. No. 114 -118 of 1995 (Mombasa).* He concluded that the burden of proof was never discharged by the prosecution.

20. Lastly, the 2nd Appellant submitted that his personal evidence needed to be weighed against that of the Prosecution's in order to arrive at a just conclusion as opposed to being treated as a mere denial contrary to section 169 (1) of the Criminal Procedure Code.

**RESPONDENT'S SUBMISSIONS**

21. The Respondent submitted on three issues namely: evidence on record, elements of the offence and sentencing.

22. Firstly, it was their submission that the evidence on record demonstrated that the victim had been assaulted by the Appellants and that his lost items were recovered from the accused persons. They also submitted that the evidence of the ten witnesses was sufficient. Secondly, the Respondent submitted that the elements of the offence of Robbery with Violence as contemplated by section 292 (2) were adequately proven. That, the injuries of the victim were corroborated by the medical report from PW9.

23. On identification, it was submitted that although the incident occurred in the night, the appellants were well known to PW1 and PW2 and there was adequate lighting at the time of the incident. They referred to the case of *Kariuki Njiru & 7 Others vs. Republic (2001) eKLR* in this regard. The Respondent submitted that the fact that the stolen items were also recovered from the Appellants within 24 hours of the robbery meant that the chain of custody was consistent and certain and this met the threshold of the doctrine of recent possession as laid out in the case of *Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a vs. Republic, Criminal Appeal No. 272 of 2016 (UR).* That the exhibits also met the threshold as set out in *Rajab Senelwa Abdallah vs. Republic (2017) eKLR*.

24. Lastly on sentencing, the Respondent submitted that the guiding principles were set out in *Wanyema vs. Republic (1971) EA 494* where a superior court was not expected to interfere with the exercise of the discretional power of sentencing unless the trial court overlooked some material factor or acted on the wrong principles or where the sentence was manifestly excessive. It was their submission that since the offence contemplated a death penalty, a sentence of 15 years was just and sufficient considering the Appellants were treated as first offenders.

**ISSUES FOR CONSIDERATION**

25. Having reviewed the facts of this case from the trial file, the grounds of appeal and the respective submissions from the parties, I find the following issues pertinent for my determination:

i) Whether the offence of Robbery with Violence was proven against the two Appellants to the required legal standard; and

ii) Whether the sentence imposed was appropriate.

i. **WHETHER THE OFFENCE OF ROBBERY WITH VIOLENCE WAS PROVEN AGAINST THE TWO APPELLANTS TO THE REQUIRED STANDARD.**

26. This being a first appeal, I am expected to review and analyse the evidence afresh in order to form an independent opinion and draw my own conclusions bearing in mind that I do not have the benefit of seeing and observing the witnesses. (*See* **Okeno vs. Republic [1972] E.A. 32 and Kiilu & Another vs. Republic [2005] 1 KLR, 174**).

27. The offence of Robbery with Violence is provided for under the Section 296(2) of the Penal Code as follows:

> ***"296. 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."*

28. 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."***

(See also **Oluoch vs. Republic [1985] KLR).**

29. Similarly, in the Court of Appeal case of **Criminal Appeal No. 300 of 2007, Dima Denge & Others vs. Republic (2013) eKLR**, the learned Bench stated as follows:

> *"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."*

30. In the present case, PW1, the victim testified that the Appellants had followed them after a night out at Arormet bar and it was at that time that the 2nd Appellant hit his friend Samwel (PW2) with a *rungu* on his back near the neck. When he turned to look, the 2nd Appellant hit him on the forehead with the *rungu*. Though he tried to defend himself by holding the 2nd Appellant by his neck, he testified that he was hit severally on the head while his friend PW2 ran away. It was also his testimony that the 1st Appellant joined in the beating. The 1st Appellant hit him on the face across the nose and his mouth until he lost consciousness.

31. PW2 testifed that he also heard footsteps from two people who were following them from behind when he was suddenly hit from behind on the neck. He staggered home in pain and had imagined that his friend PW1 had also ran away. However, he later saw a pool of blood at the scene of the incident when he returned and became afraid.

32. PW6, Kiprotich Chelogoi the *boda boda* rider testified that after he had heard about the incident in the town centre, the locals suspected that the 1st Appellant must have been involved. It was then that he proceeded to the 1st Appellant's house in the company of others and knocked. He testified that the 1st Appellant came out with a bloody vest. At the same time, the 2nd Appellant who was also present in the house had a rungu on his waist under the trouser and that he was wearing a jumper and trousers that had blood stains at the time of arrest.

33. This testimony was further corroborated by PW7, Cyrus Rotich a farmer who accompanied PW6 amongst other men to arrest the accused persons, except he added that the *rungu* which they recovered from the waist of the 2nd Appellant had blood. The Chief, PW8 also testified that he saw blood on the rungu.

34. Lastly, the Clinical Officer PW9 who attended to the victim at Longisa County Hospital tesified that the victim had sustained injuries in

his head, left hand, left shoulder and frontal head with lacerations on his face. He formed an opinion that the injuries were occassioned by a blunt object and were a day old. He produced a P3 Form marked as PEX3 (PMFI3) to confirm the medical examination.

35. Without a doubt, the testimonies of these five witnesses demonstrated that the victim had been beaten as he claimed and injured as a result. The fact that his items were also missing as a result of the incident and that those responsible for the act used a rungu on him demonstrated that the offence of robbery with violence had occurred. It is my finding that the ingredients of the offence of robbery with violence were adequately proven as all the three ingredients were proven to the required legal standard.

36. The 1st Appellant distanced himself from the robbery claiming that no items were recovered from him. I will now consider the events of the night in question in order to assess whether the Appellants had a common intention in carrying out the offence. Common intention is defined under **Section 21 of the Penal Code** which provides:-

> ***"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."***

37. This doctrine was also defined in the case of **Republic vs. Tabulayenka s/o Kirya (1943) EACA 5**, where the court held that:-

> ***"Common intention may be inferred from their presence, their actions and the omission of either of them to disassociate himself from the assault."***

38. Similarly, in **Dickson Mwangi Munene and another vs. Republic 314/2011 (2014) eKLR**, the court held:-

> ***"……where there are two or more parties that intend to pursue or to further an unlawful object or a lawful object, by unlawful means and so act or express themselves as to reveal such intention. It implies a pre-arranged plan. Although common intention can develop in the course of the commission of an offence……."***

(See also the Court of Appeal case **Njoroge vs. Republic [1983] KLR 197**).

39. From the testimonies of PW1 and PW2, it was evident that the 1st and the 2nd Appellants had acted jointly in carrying out the robbery. The two Appellants had initially joined them for drinks and after they finished, PW1 and PW2 testified that the Appellants left. Later, on their way home, PW1 and PW2 both heard footsteps and recognized the people who were following them as the ones who had joined them for drinks at the bar – the two Appellants.

40. Secondly, when the 2nd Appellant hit PW2 on the neck with a rungu, PW1 testified that he was also hit the moment he turned to look at him. At that time, the 1st Appellant joined the 2nd Appellant in hitting PW1 when he (the victim) held the 2nd Appellant by the neck in self-defense. It was PW1's testimony that the 1st Appellant hit him until he lost consciousness. Evidently, the 1st Appellant participated in the attack and demonstrated a common intention at this point by dutifully supporting his co-accused from being overpowered by the victim when he joined in the attack. They were also found together in the 1st Appellant's house the following morning in possession of the victim's items, with blood stains on their clothes and with a rungu which had blood on it. I therefore find that the two Appellants a common intention and they proceeded to execute it during the robbery.

**Identification**

41. The next critical issue is whether the two Appellants were properly identified. Identification is the link that connects an accused person (Appellants in this case) to an alleged act that constitutes an offence. Identification has been defined by the **Black's Law Dictionary 2nd Edition** as:

> ***"Proof of identity; the proving that a person, subject, or article before the court is the very same that he or it is alleged, charged, or reputed to be; as where a witness recognizes the prisoner at the bar as the same person whom he saw committing the crime; or where handwriting, stolen goods, counterfeit coin, etc., are recognized as the same which once passed under the observation of the person identifying them –'Identitas vera colligitur ex multitu- dine signorum'".***

42. In the present case, PW1 and PW2 stated that, earlier that evening they were sharing some drinks when the two Appellants came to the bar and requested if they could join them. Indeed, the four men shared the alcohol until the two Appellants left PW1 and PW2 who continued to drink until midnight. However, on their way home, PW1 and PW2 heard footsteps and turned to see who was following them, only to find that it was the two men who had joined them for drinks at the bar. It was both their testimonies that there were security lights at the shopping center from a shop and another from a building that was nearby, albeit PW1 stated that the second source of light was from a nearby residential while PW2 stated that it was from a church.

43. In considering the evidence of identification where an incident occurs at night, it is important for the Court to assess such evidence thoroughly to satisfy itself that the source of light was sufficient to enable the victim to properly see his assailant(s). This was the guiding principle in the case of **Hassan Abdallah Mohammed vs. Republic [2017] eKLR** where the Court stated that:

> ***"Visual identification in criminal cases can cause miscarriage of justice and should be carefully tested."***

44. Similarly, the court in **Wamunga vs. Republic (1989) KLR 424** at 426 stated:-

> ***"Where the 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."***

(See also **Nzaro vs. Republic (1991) KAR 212)**.

45. In this case, the Appellants had enjoyed drinks with the victim and his friend. At the time of the incident, both PW1 and PW2 testified that they saw them and recognized them as the men who were drinking with them at the bar. Additionally, PW1 stated that he knew the two from before as the 1st Appellant was known to repair motorcycle punctures at Chemaner market while the 2nd Appellant was his (PW 1's) distant relative whom he always met at the centre. PW2 also testified that he knew the 1st Appellant while the 2nd Appellant was his neighbor. I may also add that from the testimony of PW1, he stated that he held the the 2nd Appellant by the neck at the time of attack. That proximity in contact was sufficient to enable him identify who the attacker was especially if the lighting was adequate.

46. PW6 and PW7 also testified that they found the two Appellants together the next morning in the 1st Appellants house, that their clothes were bloodied, that the victim's items had been found in the 2nd Appellant's pocket and that the victim's phone was recovered under the 1st Appellant's mattress. This circumstantial evidence goes to demonstrate that the Appellants were involved in the robbery and attack that had occurred the previous night.

47. From the foregoing and analysing the intensity of the two sources of lighting which came from the shop and the other building, coupled with PW1 and PW2's prior knowledge of the Appellants, I am satisfied that this was not just a case of identification but of recognition. I am guided accordingly by the ***Turnbull Guidelines*** in considering which factors ought to be considered when analysing the evidence of recognition. These were set out in **R. vs. Turnbull & Others (1976) 3 ALL ER 549** as follows:-

> ***"... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?.... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

48. The evidence of recognition has over time been considered to be more satisfactory than that of identifcaion. This is because prior knowledge makes it easier for one to identify and properly point out a familiar face as opposed to pointing out at a stranger. This was the decison in the Court of Appeal case of **Anjononi & Others vs. Republic [1980] KLR**, where the court held that:-

> ***"...the evidence of recognition is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.***

49. The two Appellants had shared drinks with the PW1 and PW2 that evening. Though their testimonies do not disclose how long they had spent at the bar, PW1 and PW2 testified that they stayed long enough for the Appellants to finish their drinks and leave them. When PW1 and PW2 left the bar at around midnight, they were able to recognize the two Appellants as the men who followed and attacked them. I find that their ability to recognize the Appellants must have been without difficulty because there was adequate lighting and they had just sat together in the bar prior to the said incident. Therefore, I find that the evidence of identification was without doubt, watertight because it was more of recognizing the two men with whom they had shared drinks with earlier that evening. It is my conclusion therefore that both the 1st and 2nd Appellants were together in the bar with the victims and were later recognized by PW1 and PW2 when they jointly attacked them on their way home. It is my finding that they were adequately identified by PW1 and PW2 and therefore properly linked to the said offence.

**Recent Possession**

50. The identifiation of the Appellants was further bolstered by the recovery of the victim's possessions from them. In the case of **George Otieno Dida & Another vs. Republic [2011] eKLR,** the victim's stolen goods had been recovered/found in the possession of the Appellant less than five hours after the robbery. The Court of Appeal in this case held as follows:

> ***"There are concurrent findings of fact by both the trial and first appellate courts that indeed there were robberies, several items including the ones produced in court were stolen in the course of those robberies, and the appellants were found in possession of the same only five hours or less after the robberies.....In our view, the evidence against the appellants though circumstantial, raised a rebuttable presumption of fact under section 119 of the Evidence Act, Cap 80 Laws of Kenya, that they were either the thieves or guilty receivers. The evidence excludes the latter because they were found in possession only less than 5 hours after the theft and it is not reasonably possible that the goods would have within that short time changed hands."***

51. Similarly, in **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic, Criminal Appeal No. 272 of 2005**, the Court of Appeal held:-

> ***"…It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case,***

***the possession must be positively proved. In other words, there must be positive proof, first: that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."***

52. It was the testimony of PW1 that before the incident, he had a wallet and a phone when he left the bar but when he regained consciousness in the hospital after the incident, he did not have them. PW5 who was the victim's brother testified that when the police arrived with the chief at Chemaner Shopping centre where the Appellants had been arrested by members of the public, he saw the chief remove a wallet and a phone from his pocket which had been recovered from the accused persons. PW6 and PW7 stated that when they searched the 2nd Appellant, they found a brown wallet in his trouser's back pocket which contained the victim's documents including his national Identity card. They also found the phone belonging to the victim under the mattress of the 1st Appellant's bed. This linked both (Appellants) of them to the crime as they were both found with the stolen items.

53. Coupled with the above evidence, is the testimony of the security guard at Visionary Academy, PW3 who stated that he had found a phone make *Itel* and produced as PEX 7a, a charger produced as PEX 7b and a match box produced as PEX 7c, at the scene where the victim was found. PW4, the victim's brother also took these items thinking that they belonged to the victim but he (the victim) later confirmed after regaining consciousness that those items did not belong to him. At the same time PW6 who was a neighbor to the 1st Appellant stated that the 1st Appellant had woken him up to ask for assistance to find his phone as he claimed to have lost it along the road going to Kibira, but he (PW6) could not be of assistance as his phone did not have airtime. PW6's testimony corroborated that of PW3 and PW4 in that, whatever was recovered from the scene (PEX 7a-c) belonged to the 1st Appellant which must have been lost during the attack while whatever was recovered from the 1st Appellant's house belonged to the victim.

54. In **M'Riungu vs. Republic (1983) KLR 455,** the Court of Appeal held with respect to corroboration at page 463 that:-

***"As was stated in R. vs. Baskerville (1916) 2 KB 658 that corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime, and we agree that it must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed but also that the prisoner committed it."***

55. The items recovered from the 2nd Appellant were a black wallet produced as PEX 4a and identified by the victim himself as the wallet which he had lost. The said wallet also contained a Sacco Link ATM card with the victim's name, a voter's card, Family Bank ATM Account Card, Family bank ATM Card and the victim's national ID all produced by PW10, PC Marinda as PEX 4b-4f.

56. In this case, the recovery of the above stated items which had been stolen from PW1 independently connects the 1st Appellant and the 2nd Appellant to the robbery. The two Appellants must have been the actual perpetrators of the robbery or the very least, beneficiaries of the said robbery. Additionally, since the 1st Appellant's phone had been recovered at the scene of the incident and mistakenly thought to belong to the victim is enough to tie him to the offence or at the very least to prove that he must have been present at the scene of the crime. He must have lost his items during the robbery and only discovered too late that he didn't have his phone. Thus, this doctrine of recent possession is clearly established and corroborates the evidence of identification which I have considered above.

57. The 1st Appellant also raised the issue of inventory as one of his grounds of appeal and stated that the recovered items were not directly linked to him. An inventory has been defined by the **Black's Law Dictionary, 10th Editiion at page 1552** as, *"A complete search of an arrestee's person before the arrestee is booked into jail; All possessions found are typically held in polic custody."*

58. I have perused the trial file and confirmed that there was no inventory prepared by the arresting officer. I also note that the Appellants were arrested by the members of the public who were the ones who recovered the items from the 1st Appellant's house and the 2nd Appellant's pockets. The issue therefore is whether the absence of an inventory from the arresting officer was capable of casting doubt on the Respondent's evidence that the victim's lost items had been recovered from the Appellants and whether the lack of an inventory in a criminal trial would likely prejudice a person who has been accused of the offence such as in the present appeal.

59. In **Peter N. Wanjohi Wangechi vs. Republic, Criminal Appeal 220 of 2012, [2014] eKLR**, the Court of Appeal in Nyeri aptly explained the fact that an inventory is closely connected to stolen items that are recovered in advancing the doctrine of recent possession. Visram, Koome and Odek JJ.A analysed the absence of an inventory in that appeal as follows:-

***"..... the issue of the inventory is intricately connected to recovery of stolen items under the doctrine of recent possession.....it is important in a criminal case for the investigating officer to maintain an inventory of items recovered. However in this case, no inventory was kept, but that notwithstanding, two courts below were satisfied with the evidence of the three police officers who conducted a search on the appellant, found the items and arrested him. Would failure to prepare an inventory render this conviction of the appellant unsafe? We agree with the State that whereas it is prudent for investigating officers who arrested the appellant herein to take an inventory of what was recovered from him; failure to do so did not compromise the evidence against the appellant as there was recorded report at the police station confirming robbery of similar items..... The police officers in the instant case compared the items they recovered from the appellant against their records. This comparison and the identification of the items thereafter formed the basis of the case against the appellant....."***

60. In the present appeal, the items recovered were a brown wallet containing the victim's personal cards and his mobile phone make *Kicka*. The wallet was recovered from the back pocket of the 2nd Appellant. PW6 confirmed that though he did not know where the 2nd Appellant lived, that morning both Appellants were found together in the 1st Appellant's house. At the same time, the mobile phone was recovered

from under the 1st Appellant's mattress. Clearly, the members of the public who were also witnesses in this case were the ones who testified how the stolen items were recovered. The fact that no inventory was not prepared does not devalue the evidence of recent possession. Both PW6 and PW7 who conducted the search and the arrest confirmed that the stolen items were recovered from the two Appellants.

61. It is my finding therefore, that failure to prepare the inventory did not in any way affect the evidence of recent possession and that further, the evidence adduced by the two witnesses who recovered the items was cogent enough to link the two Appellants to the stolen items. The evidence therefore goes to strengthen the prosecution's case.

**Inconsistent and Contradictory Evidence**

62. In the present Appeal, the 2nd Appellant raised inconsistent evidence as one of the grounds of his appeal. It is a requirement for a trial court to carefully note and analyse any contradictions that may arise during examination of the various witnesses and determine the impact of the same to the overall case. In **Erick Onyango Ondeng' vs. Republic [2014] eKLR,** it was stated as follows:-

> ***"The primary duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honoured devise for testing the truth or correctness of evidence. Next is the first appellate court which by law, it is its bounden duty to re-consider, re-evaluate and analyse the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified. (See Okeno vs Republic (1972) EA 32)."***

63. The main consideration in a situation such as the present appeal should be whether the inconsistencies were material enough to weaken the probative value of the prosecution evidence. In **Peter Ngure Mwangi vs. Republic [2014] eKLR**, the Court of Appeal, stated that:

> ***"We, therefore find that on the totality of the evidence before us, any difference there may have been in the evidence adduced by the prosecution consisted of minor discrepancies and inconsistencies. We find that these were not material and did not weaken the probative value of the evidence tendered by the*** **prosecution in support of their case."**

64. The inconsistency referred to in this case by the 2nd Appellant is in relation to the actual scene of the crime and the sources of lighting. He pointed out to the fact that PW1 stated that he was attacked between two security lights, one from the last shop at the centre and another from a resident who lived nearby, while PW2 stated that the sources of light were the last shop and a church that was nearby. PW3 on the other hand stated that the scene of crime was some distance from the security light from a shop in town. I have looked at the Record in the trial file and noted that PW3 stated that the school in which he worked as a guard was not far from the shopping centre and that the scene of the crime was between the school and town. The 2nd Appellant also stated that PW4 who visited the scene never mentioned a church, school or town but referred to a hotel in town.

65. It seems clear to this Court that the area surrounding the scene of the crime was somewhere between the school and the shopping centre which the guard referred to as town. In his submissions, the 2nd Appellant stated that because the victim was found some distance from the security light then it means that the place was dark and thus he couldn't properly see his attackers. I however do not think that just because the victim was found some distance from the lights is enough to negate his ability to identify the assailants. He could have well been beaten nearer to the lights then found some distance away. The question is whether the area at which he was attacked, whether between the shop and the church or the school and shopping centre, had sufficient lighting for PW1 to be able to see and identify or recognize his attackers. I find as already determined that PW1 was able to properly see his assailants and thus this contradiction does not vitiate the evidence of identification adduced by the prosecution.

66. Secondly, the inconsistency in terms of whether the second source of lighting came from a church or a shop or residence is immaterial. The bottom line remains that there was light from some source, enough to help the victim and his friend see their attackers and this small inconsistency which the Court can ignore. As stated in the Uganda case of **Twehangane Alfred vs. Uganda (2003) UG CA 6** in this respect where the court held that:

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

**Crucial/Material Witnesses**

67. The two Appellants complained that the prosecution did not call some witnesses. The guiding principles in this regard were aptly stated in the case of **Bukenya & Others vs. Uganda [1972] EA 549** thus:-

> *"(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.*
>
> *(ii) That the Court has the right and the duty to call witnesses whose evidence appears essential to the just decision of the case.*
>
> *(iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution."*

68. It was the submission of the 2nd Appellant that the fact that the prosecution failed to call Cyrus Kibet Rotich, Michael Cherogoi, Hillary the motorcycle rider and Dickson Bosuben to verify that they had indeed accompanied PW6 to arrest them was detrimental to their case and that the Court ought to draw an adverse inference against the prosecution's case in this regard. However, the above principles are clear and in the present case, the evidence of the witnesses who were called was enough to establish a *prima facie* case against the Appellants. It is my conclusion that there was no value to be derived from calling additional witnesses and therefore, I am not inclined to draw an adverse inference against the prosecution as the above precedent has stated.

**The Appellants' Defence**

69. Lastly, the Appellants both faulted the trial magistrate for not considering their evidence. The 1st Appellant stated that he took some items home at 5.00 p.m. on the material day and returned to Chemaner town at 6.00 p.m. He then stated that he went to the house and slept till morning because he had chest pains when he was woken up by PW6 who he thought wanted him to repair his boda boda, only to be led to the stage where he found the 1st Appellant tied at the place. He stated that he was beaten by members of the public and they were only taken to Longisa County hospital when the chief and police came to their rescue. He also mentioned that he had previously disagreed with PW6 on the cost of repairing his motor cycle.

70. The 2nd Appellant on the other hand in his defense stated that he had harvested vegetables until 5.00 p.m. then went home to sleep until 7.00 a.m. the next day when he arose to go deliver the vegetables. As he awaited the person who would transport the vegetables, the *boda boda* rider who had carried him went to fuel and it was at that point that he was called by two people who began to beat him. It was his testifimony that he only regained consciousness at the hospital.

71. I have reviewed and considered the respective defences of the Appellants. The testimonies of the Appellants did not in any way cast doubt to the weighty evidence adduced by the prosecution. From the Record, it is not true that the trial magistrate did not give enough consideration to the evidence of both Appellants. The evidence in totality pointed to the accused persons as the attackers of the complainant in this case. The Respondents in this Appeal discharged their burden of proof and established their case to the required threshold. As stated by Lord Denning in **Miller vs. Minister of Pensions [1947] 2 ALL ER 372 – 373**, the degree of burden of proof in a criminal case is as follows:-

> ***"That degree is well settled. It needs not reach certainly, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would prevail 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 of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice."***

**I. WHETHER THE SENTENCE IMPOSED WAS APPROPRIATE.**

72. In the Court of Appeal case of **Bernard Kimani Gacheru vs. Republic [2002] eKLR**, the following was stated with respect to sentencing:

> ***"It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence 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 principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."***

73. The offence of Robbery with Violence attracts a mandatory sentence of death. In my view,the sentence meted was lenient. However, following the authority above, I shall not interfere with it.

74. In the final analysis, it is my finding that this appeal lacks merit. I uphold both the conviction and sentence. Each Appellant shall serve 15 years imprisonment, which sentence shall run from 22nd July, 2017 being the date of arrest and pre-trial custody.

75. Orders accordingly.

**JUDGMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 28TH DAY OF FEBRUARY, 2022.**

**.....**

**R. LAGAT-KORIR**

**JUDGE**

**JUDGMENT DELIVERED VIRTUALLY IN THE PRESENCE OF 1ST AND 2ND APPELLANTS, ( VIRTUALLY PRESENT AT NAIRVASHA MAXIMUM PRISON) MR. MURITHI FOR THE RESPONDENT AND KORIR (COURT ASSISTANT).**