REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(APPELLATE SIDE)

CRIMINAL APPEAL NOS. E017 & E14 OF 2021

(Coram: Odunga J)

MAURICE OKELLO KABURU.....1ST APPELLANT

JOHNSTONE ERICK BWIRE .....2nd APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal against the conviction and sentence at Mavoko Law Courts before Hon C.C. Aluoch (SPM) on 4th February 2021)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

MAURICE OKELLO KABURU.....1ST ACCUSED

JOHNSTONE ERICK BWIRE .....2ND ACCUSED

JUDGEMENT

1. This is an appeal against the judgment and sentence delivered by **Honourable C.C. Oluoch**, Senior Principal Magistrate at Mavoko Law Courts on 4th of February 2021.

2. The Appellants were charged jointly with another with four counts.

3. In count 1, the Appellants were charged with breaking into a building and committing a felony contrary to section 306(a) of the ***Penal Code***. The Particulars of the offence were that on the night between 16th and 17th August 2018 at Sartaj Building within Machakos Sub-County, Machakos County jointly with others not before the court, they broke and entered into offices of the Director of Public Prosecutions, Machakos Branch and committed therein a felony namely stealing.

4. In count II, they are jointly charged with stealing from a locked office contrary to section 279 (g) of the ***Penal Code***. The particulars were that on the night between 16th and 17th August 2018 at Sartaj Building within Machakos Sub- County, Machakos County jointly with others not before the court, they stole eleven (11) HP monitors serial numbers CNC224595A, 6CN2271BFF, 6CM2271BZ5, 6CM2271BDM, CNC309R5YV, CNC309R4LM, 6CM2271BZ3, CN-0ZN00N-64180-22H-OB5M, CN-02NOON-64180-22H-04PM and eleven (11) HP CPU serial number TRF2320NFB, TRF2500T25, TRF2500T43, TRF2500T37, TRF2500T6K, TRF32109F6, TRF2500T59, TRF32109FV and 81423-505-220-554 all valued at Kshs. 900,000/- the property of the Office of the Director of Public Prosecutions Machakos Branch and in order to steal opened the said locked office using a breaking implement namely and iron bar.

5. In count III, the Appellants were charged with breaking into a building and committing a felony contrary to section 306 (a) of the ***Penal Code***. The Particulars of the offence were that on the night between 16th and 17th August 2018 at Sartaj Building within Machakos Sub-County, Machakos County jointly with others not before the court, they broke and entered into a cyber café shop and committed therein a felony namely stealing.

6. In count IV, the duo were charged with stealing from a locked office contrary to section 279 (g) of the ***Penal Code***. The particulars were that on the on the night between 16th and 17th August 2018 at Sartaj Building within Machakos Sub- County, Machakos County jointly with others not before the court, they stole one computer make DELL N5050, Laptop make HP Probook 8470 serial number CNU331BOLL, Laptop make HP Probook 8470 serial number CNU2529MN8, Probook 8470 serial number CNU349B /9JR), HP8460 P serial number CNU1341T75, HP Elite book serial number CNUB199BK, HP Elite book serial number 8CU4410GC4, HP revalue serial number 2CE03600UP, two Epsom 83c series projector all valued at Kshs 425,000 the property of Eric Meau David and in order to steal opened a locked cyber café shop using a breaking implement namely an iron bar.

7. The Appellants pleaded not guilty to the four counts and the case proceeded to trial with the prosecution called nine witnesses while the defence had two witnesses.

8. The appellants were convicted and sentenced to each serve three (3) years in count 1 and three (3) years in count III which sentences were to sun concurrently with the one they were serving at the time. Dissatisfied with the decision of the trial court, each Appellant appealed to this court challenging the conviction and sentence meted against them.

9. By order of this court, the two appeals were consolidated with the 1st Appellant being **Maurice Okello Kaburu** while the 2nd Appellant is **Johnson Erick Bwire.**

10. The 2nd Appellant filed what he called a memorandum of appeal on 23rd February 2021 while the 1st Appellant filed his petition of appeal on 1st of September 2021.

11. The 2nd Appellant appealed on the grounds that the Trial court erred in law and facts in;

a. Concluding that the appellant committed the offence while there is no image of him entering and leaving the premises of the complainants.

b. Using the wrong definition of the offence to make an inference.

c. Not considering the ingredients that relate to the offence of breaking and stealing as required by the law.

d. Relying on her opinion to fill gaps left by the prosecution case.

e. Misrepresenting the evidence given in open court as per to date and time.

f. Convicting the Appellant on defective charge sheet, as to date, details of the cases.

g. Convicting the Appellant on natural laws that govern public places.

h. Convicting the Appellant on mere suspicion and hearsay of the witnesses without tangible evidence.

i. Relying heavily on her opinion to convict the appellant

j. Failing to take necessary precaution on relying on visual evidence as required in identification and recognition of the offence alleged.

k. Disregarding the forensic expert evidence on finger dusting as crucial evidence of breaking and stealing.

12. The 2nd Appellant also asked the court to consider section 333(2) of the ***Criminal Procedure Code*** and the time spent in custody.

13. The 1st Appellant appealed on the grounds that;

a. The conviction is against the weight of the evidence adduced and the sentence is excessive.

b. The Honourable magistrate erred in law and fact by failing to diligently analyse the evidence adduced during trial hence arriving at the wrong conclusion.

c. The Learned Magistrate erred in law and facts by admitting the evidence that is uncollaborated (sic).

d. The Learned Magistrate erred in law and facts by using circumstantial evidence to convict the Appellant.

e. The Trial court erred in law and fact in not considering that the grey bag produced in court and the one on the CCTV camera did not capture a meaningful comparison as the camera did not capture it at close range.

f. The Trial court erred in law and fact by acting pre maturely and hurriedly in not admitting the evidence of the forensic expert in the case of dusting of the scene of crime as of substance in the case of breaking and stealing.

g. The Trial court erred in law and fact by ignoring the evidence of crucial witness in the case of breaking and stealing and disregarding the same as of no consequences noting a glaring omission in the entire evidence.

h. The Trial court erred in law and fact in admitting uncollaborated (sic) evidence.

i. The Trial court erred in law and fact by failing to consider elements of stealing and breaking.

j. The Trial court erred in law and fact in not observing that the charge sheet was fatally defective and sentencing the appellant on it.

k. The Trial court erred in law and fact in placing the appellant at the scene of crime on circumstantial evidence failing to deduce that the prosecution case lacks ingredients of the offence.

l. The Trial court erred in law and fact by failing to deduce that the prosecution case lacks ingredients of the offence of breaking and stealing to convict the appellant of the offence hereof.

m. The Trial court erred in law and fact in failing to follow the right procedure for adducing video evidence.

n. The Trial court erred in law and fact by taking into account irrelevant factors and applied the wrong principles in sentencing by failing to take into account the period spent by the Appellant in remand.

Prosecution Case

14. PW1, **Esther Mwikali Ndeto** an employee of the Office of Director of Public Prosecutions whose her offices were on the 4th Floor of Sartaj Building off Kangundo road was at work from 8.00 am to 5pm on 16th of August 2018. At closing time, she believed that a subordinate staff, **Victoria**, **PW3**. However, when she reported to work on 17th of August 2018, she was informed by **PW3** and **Josephine**, a driver, that the office had been broken into. She noticed that her computer and those of her colleagues which were there the previous evening numbering 8 or 9, were not on the desks save for one.

15. According to the witness, there was only one entrance to the office which had a wooden door reinforced with a steel door but which were normally locked with a padlock. She recalled that on 16th August, 2018, as she was going to buy her lunch, she shared the elevator with the 2nd Appellant, who though unknown to her, was in a black suit. She was able to see him because the elevator was lit. She however admitted that she did not mention this fact in her statement since she believed he was just any other person.

16. It was her evidence that there was no anomaly on the office door hence she could not ascertain if the office had been broken into as she was not the first to arrive. She confirmed that no action had been taken against any staff member in relation to the incident and she was not aware if the cyber café had been broken into.

17. **Eric Mwau David,** PW2**,** was an IT professional running a bureau and computer accessories business on the 4th Flloor of Sartaj Building which business he started in 2017. Though he was running it himself, he was being occasionally assisted by his wife. The said premises had a glass door and were partitioned into two by aluminium but the entire place had a glass wall. Both the outer and the inner locks had keys. While he had one key, his wife had another while his parents also had one key. In his office, the first room had a desk with laptops and a printer and the partition had shelve which were only accessible from the inner space but the shelves also had locks though the computer accessories such as the routers, memory cards were on display.

18. On 16th August 2018, at 5.30pm, a man, whom he identified to be the 2nd Appellant, went to inquire whether he was selling laptops and the price but walked out without purchasing any item after telling him that he had a child who was pressing him for a laptop. He saw the man speaking on the phone at the staircase but by the time he was leaving after locking the premises at 6.45pm, he did not see the man. Though there were other tenants on that floor, including the ODPP, he was usually the last person to leave.

19. At 10.40pm, he received a call from **Chebii**, a Kenya Revenue Authority guard whose offices were on the third floor informing him that while he was doing surveillance he noticed the door to PW2's premises was open and asked him to go to the office as it seemed there was a problem. He proceeded there with his wife and upon arrival he found the door bent and the glass broken as if someone had used a heavy object to force the door to open. The sliding door was also open at the end and the apportioned shelf at the second space that had laptops was empty while the lock used to lock the glass was tampered with and the glass broken. Two projectors and eight laptops were missing and a laptop bag had been taken away. By then the owner of the building Swan Singh had been informed had had arrived and the matter was reported to Machakos Police Station.

20. However, before they went to report the incident, the said **Chebii** had informed him that they had looked at the CCTV footage and realised that the ODPP 's office which as 20 steps away had also been broken into. From the CCTV footage, he recognized the man who had inquired about the laptop as the one who went to 4th floor and kept moving around making calls and changing a red pullover he had and a light green cap. There was another man walking around. This, according to him, was earlier in the day. Between 5.30pm - 6.00 pm, another man with a black bag with a shoulder strand arrived and they were seen forcing something at the ODPP and appearing to be breaking the door, using a lot of force before removing a padlock from his pocket with which he locked the door. The man in the cap switched off the lights. After locking the doors, the two men left and were now seen in his premises. It was his observation that they were taking the loot in bags to the basement using the elevator. The two also went to his premises and left with bags but he was not able to see them break into his office. He said the fat man who had asked for the laptop earlier walked on foot while the other rode a motorcycle.

21. PW2 identified the receipts for purchase of his laptops. It was his evidence that he participated in the identification parade for the man who had gone to the shop. The identification parade form and the CCTV clip were both marked for identification.

22. When the CCTV was played in court, a bulky man was observed entering the mall and a second person in a black suit was also seen. The person who went to the shop was identified as the man seen walking around the floor on phone at around 5.55pm and at 6.08pm and to PW2's shop. Referred to clip number 5, indicating the time to be 8.08pm, he stated that the elevator was on 4th floor and the suspect was carrying something as he walked to the shop. At 8.09 they got in and at 8.18pm they came down carrying bags. He identified the 2nd Appellant as the person who went to his shop and said that he only saw the 2nd Appellant in the clip.

23. Upon being cross-examined, he stated that the CCTV was owned by the owner of the building but insisted that there was an act of breaking a door in the clip. He admitted that amongst the receipts produced by him, only one had a VAT receipt and pin for 2012. In his evidence, he did not need an ETR for a business with a turnover of less than five million Kenya shillings. According to him, though he made his first report to the police after his shop was broken into, he gave the description of the suspect the following morning after viewing the CCTV clip. He testified that the suspect walked up empty handed and left with a bag. He explained that the parade had 8 or 9 people. He insisted that he saw the 1st Appellant walk out of his shop with a black bag having walked in with a small bag.

24. **PW3, Victoria Mutheu Katuu,** a customer care desk operator at the ODPP office in Machakos informed the Court that the office had two doors, the inner one being wooden usually locked using a padlock while the outer one was metallic usually locked using lock and key. On 16th of August 2018, at 5.00pm, while in the company of **Justina Ndunge,** she safely locked the door since she was the only one with the key. By then all the computers were inside. On 17th August 2018 when she arrived she met **Swan**, the owner of the building who inquired why the office was not locked. According to her, it appeared like the office had been broken into. She noticed the inner door was not locked but the outer door was locked with a bigger padlock that she could not open. When the police arrived at 8.30 am, the office was opened and she realised that 11 computers were missing. She was unable to identify the suspects in court and she did not know who broke and stole from the office but only saw the police cutting the padlock with.

25. **PW4, Barnabus Musyoka Mutisya,** a prosecution clerk at the said ODPP's testified that on 16th of August 2018, he left the office at 5.00 leaving **PW3** and **Ndunge** behind. On 17th of August 2018 when he reported to the office, he found their Secretary, **Christine Mwikali,** the owner of the building and the owner of the cyber café standing outside and was informed by **Christine**, their secretary, that the office had been broken into and they were waiting for the police. When the police arrived, they looked at the door, and cut the strange padlock that had been used to close the outer door. According to the witness, the usual one was small and black while the one they found was big and greyish. He noticed that his computer and CPU were missing and only the back up was remaining while his files and books were intact. He disclosed that the monitor serial number was 6CN2271FNO while that of the CPU was TRF2500737. He also noticed that 11 computers were missing. According to him, it was **Victoria Ndinda** who used to lock the office. He however, did not know the Apelalntsa

26. **PW5,** CIP **Beneutislus Wanjohi** attached to DCI Headquarters, an expert in forensic imaging and acoustics, received a memo and DVR, a storage for electronics, from the crime scene that contained the CCTV footage marked A. He watched the footage and captured 43 pictures using VCR Mecha Player programme installed in the laptop. According to him, photo 1& 2 for 5:45:32 to 5:45:56 showed a man dressed in a blue long sleeved shirt and black shoes at the reception area of a lift for the floor at ODPP office. Photo 3 to 8 for 5:08:8 to 6:18:13 showed another man dresses in a black suit, black shoes and a white shirt at the lift area of the reception with a black bag hanging on his shoulder and is seen at the ODPP office door going towards the lift. Photo 9 and 10 for 6:13:52 to 6:16:51 the man in photo 1 and 2 is seen talking on phone. Photo 10 to 13 for 6:36:26 to 29, another man with a checked suit along the corridors. Photo 14 to 22 for 6:47 to 7:29:25 a man with a green hat, red pullover, black pullover and brown shoes along the corridors with a phone seen getting into ODPP and coming out with bags on both hands. In photo 20 he is seen hanging the bag on his left shoulder and getting into the lift at ODPP floor and getting into the said office. Photo 23 for 7:36:18 showed the man photo 14 to 22 is still on phone. Photo 24 to 30, 32 & 33 for 7:38:41 to 8:06:40 and 8:17:40 to 8:17:55 respectively showed the men in photos 3-8 and 14- 22 are seen on the floor of ODPP coming out with loaded bags and getting into the lift and coming out with the bags at the lower floor. Photo 31-34 for 8:17:06 to 8:18:09 showed the man in photo 1 & 2 getting out of the building carrying a bag on the right hand. On reaching the ground floor, the bag is hanging from the right shoulder and is on phone. In PW8's opinion, photo 1, 31 and 34 are for the same suspect in 14 to 23.

27. According to the witness, the still pictures were captured from the clip and that the exhibit memo stated where it was captured. The DVD was however taken by **Cpl Wafula** while the I.O guided him on the persons of interest. He stated that the clip did not capture the tools used to break the premises and he could also not tell the contents of the bags they were carrying. Since the bags were similar in colour, he was unable to tell how many bags were in the photographs as they were similar in colour. He stated that he developed the photographs from the CCTV Clip forwaded in original form.

28. **IP Gerfas Okoth** who testified as PW6**,** was the deputy OCS, Machakos. According to him, he conducted an identification parade between 7.50 and 8:50 hours after being approached by **IO Wanjohi** where the 2nd Appellant was positively identified by **Erick Mwau** by touching. The suspect, he stated, was among 8 people of the same height as the suspect standing in a straight line. The suspect chose to stand between number 2 and 3 in the parade and had consented to the parade. He stated that the witness had not seen him before the parade. He was however unable to identify the suspect in court due to lapse of time.

29. **PW7, Corpral Linus Loitulia** attached to DCIO Kajiado on 28th of June 2018 at 7.00am received reports that the Kajiado National Intelligence Office had been broken into by unknown people. After investigations led by him, he intercepted motor vehicle KCP 209E Toyota Harrier along Ruai Highway and arrested the 2nd Appellant on 28th September 2018. They recovered a grey bag and a metallic bar as well as a Ceska Pistol Serial Number B609165 with 14 rounds of 9mm ammunition. Upon search of his house, they recovered a NIS officer's maasai belt. He was charged. Later on 12th of October 2018 he arrested the 1st Appellant whom they had been looking for at Malaa Quarry area in Ruai and upon searching him and his house, they recovered Birth certificate booklets, death certificate booklets, GOK Seals for the registrar of births and deaths, assorted electric and computer cables, 14 assorted bags, several metallic chains, assorted bank cheques from Sidian and other items and he was charged accordingly.

30. He however stated that he did not recover anything in relation to this case. However, since the offences were cognizable, he did not require a search warrant. It was his testimony that the 2nd Appellant was convicted by the Kajiado court and sentenced to two years and they believed the 1st Appellant had implements for breaking into houses including the metal bar that was of interest to them. In addition, they recovered assorted bags from the 2nd Appellants' house which they believed were used to carry computers from various offices. He was however arrested for the Kajiado case.

31. **PW8, CIP Charles Wanjohi**, the Investigating officer, testified that on 17th of August when he reported to work, he was informed of a breaking report, booked by PW1, to a cyber café situate at a building along Kangundo road. This report was similar to another report from the ODPP. In the company of the OCS Machakos **CIP Mohammed** as well as in charge crime scene **IP Maurice Ndunda**, they proceeded to the scene where they took photographs of the entrance and basement. On the 4th floor, they found CCTV back up and found the glass sliding door of the cyber café been broken using a probable sharp object.

32. At the ODPP, they found the door, which was wooden with a grill, had also been opened and the padlock replaced. Inside, they were shown where the computers and monitors usually were by the secretary and they took photographs. From the CCTV, they established that unknown persons went to 4th floor of the building and could be seen charting at around 5.00pm before the offices had not been closed. They also established that a crime had been committed on 16th June2018 at County Commissioner's office in Kajiado where a black motor vehicle was captured by CCTV and information circulated. Further, that the 2nd Appellant was arrested on 28th September 2018 by CCIO's officers from Kajiado. He went to Kajiado and was shown the items recovered from the 2nd Appellant being MF1 P7 AND P8 which he alleged was a similar bag to the one in the CCTV footage.

33. It was his evidence that the 2nd Appellant was produced from Kitui prison and in the CCTV he was seen wearing a green hat and a red pullover, which were found in his house on 1st of November 2018 when they went to his home with him, accompanied by PW9 who took photographs of the house. The witness stated that from the mobile phone recovered from the 1st Appellant, 0722xxxxxx, it was established that he was at Machakos at 20:29:51 on 16th of August 2018 as seen in the phone Geo Location records. He produced the list of computers from ODPP and certificate of photographic prints for the ODPP Machakos and the 1st Appellant's house which he exhibited.

34. He, however, did not have the metal rod in court as an inventory was done at Kajiado and admitted that the bag did not have a peculiar mark but was in the CCTV footage. He also said that the mobile data did not show the exact location in Machakos. Though it was his evidence that the 1st Appellant was seen carrying computers, he could not prove if the 1st Appellant's car was at the crime scene. In addition, while he said that he picked the metal rod from the 1st Appellant's car, no dusting was done and he maintained that the breaking was done by something like a sharp object. He admitted that he did not find any breaking instruments in the Appellant's house and that the elders were not involved in signing of the inventory which was signed by his children as witnesses.

35. He however insisted that the CCTV footage showed two men who were seen together and one of the attire worn by the suspects was in court.

36. **PW9, IP Maurice Ndunda,** a forensic Crime Services Machakos stated that on 17th of September 2018 together with PW8, he went to ODPP on 4th floor, Sartaj Building within Machakos town and took 20 photographs of the scene of the incident of breaking which he processed and exhibited together with the certificate. He told the court that photo 1 to15 were general and close up views of the main entrance and entrance to the basement as well as entrance to the ODPP while photo 16 to 20 were general and close up views of the cyber café. He stated that on 1st of November 2018, he went with PW8 and **CPL Wafula** to the house of **Bwire**, the 1st Appellant and recovered a green hat and a red pullover. He took photos of the homestead and the house where the items were recovered which he enlarged and exhibited.

37. It was his evidence that he followed the investigating officer to different places where recoveries were made and also assisted in arrests. However, there were no valuable fingerprints on the items he photographed.

Defence Case

38. Upon being placed on his defence, the 2nd Appellant gave sworn evidence that he is an IT Expert who runs Papion Limited for ICT and Papion Limited for car hire. On 16th August 2018 he took his daughter to school and went for his daily duties at Kenya Cinema 4th Floor to meet a client who had car problems and who asked him to meet him at the parking of Sartaj building. He arrived at 5pm and decided to window shop for the daughter who wanted a laptop as he waited for his client who was coming from Makueni. He talked to PW2 and left. He then called his client to see where he had reached and continued to do so until his arrival. He stated that he gave him Subaru KCN 923C and took the Silver Toyota NZE KBX 664K and left for home.

39. On 12th October 2018 at 4am, police officers entered his home and took some exhibits of utensils, electronics, school bags and a motor vehicle registration number Subaru KCN 923C. He was later charged in Kajiado Criminal case No.1562 of 18 and it is while there that the investigation officer in this case informed him that he had a case in Machakos the following day. The said Investigation officer, **Corpral Mbula** and **Ip Ndunda** escorted him to his home, conducted a search and took a hat he was wearing and a pullover he was wearing on 16th of August 2018. The following day an identification parade was conducted by the Deputy OCS and he was identified by PW2. It was his position that he did not know anything concerning this case. He exhibited a certificate of incorporation of the company.

40. In his evidence he reiterated that he was an IT expert with a car hire business. He stated that he went to Machakos to collect his vehicle that had a mechanical problem in order to take it to the mechanic. He, however, admitted that he met PW2 and confirmed that the exhibits seized belonged to him.

41. The 1st Appellant, similarly gave sworn evidence and stated that he is a contractor with Royal Plus Limited which deals with real estate and management and is a licensed firearm holder. He contended that he was arrested at Ruai 26 on 28th of February, 2018 100m from his house. He stated that he did not know about the charges and did not commit the offence. He averred that on 16th of August 2018, he was at Green Gardens Hotel until 8pm for his leisure when he travelled back home. He claimed that the exhibits used in Kajiado were the same ones used in the court.

42. It was his evidence that the 2nd Appellant was his cousin and admitted that on 16th of August 2018 he was in Machakos county but was arrested while in the company of his wife at Ruai 26 where he lived. He denied any knowledge of the investigating officer or PW2.

Judgment of the Trial Court

43. The court, in her judgement cited the case of **Michael Maundu Wambua vs Republic [2006] eKLR** and section 306 of the ***Penal Code*** on the definition of breaking. She found that the 1st Appellant entered Machakos County at 3pm and Green Garden Hotel at 19:15:57 and left at 19:36:48 therefore did not stay in the hotel for long. His image was also captured by the CCTV of the building. The trial court was of the view that it was not a coincidence that cousins and friends, as per the 1st Appellant's evidence, were at one location at the same time once presented with strong evidence against them.

44. It was her finding that the photographs and CCTV clip were produced in accordance with section 106(b) of the ***Evidence Act*** and that any fears of the clip being edited were allayed by PW5. In addition, there was no need to call the security officers as the investigating officer had already testified that he was in the back room and watched the clip. The trial court therefore found the Appellants guilty of count 1 and 3 but acquitted them under section 215 of the ***Criminal Procedure Code*** for Count 2 and 4.

Appellant's Submissions

45. The 2nd Appellant filed submissions on 15th of November 2021 in which he asked the court to review his sentence on the premise that the time spent in custody of 28 months since his arrest was not taken into account by the Trial Court when he was being sentenced. Reference was made to the case of **Danson Muse Anzika vs Republic [2019] eKLR.** He opined that the sentence was harsh and excessive. He also contended that he had been charged under section 306 (a) of the ***Penal Code*** which does not provide for the punishment.

46. The 1st Appellant filed submissions on 1st of September 2021 in which he submitted on six grounds while asking the court to allow the Appeal, quash the judgement and set aside the sentence. He submitted that the charge sheet was defective since count 1 did not specify the items he was accused of stealing. He relied on the case of **Isaac Omambia vs Republic [1995] eKLR**. On the CCTV, he submitted that the clips were obtained from a backroom showing interference. He relied on the case of **John Kibii Langat vs. Republic [2005] eKLR** in which he alleged an appeal was allowed for want of production of a certificate under the ***Evidence Act***. He opined that PW5 did not state his responsibility or management of the production of the information extracted and did not produce a certificate as per section 106 (4) of the ***Evidence Act*** prejudicing the 2nd Appellant.

47. The 1st Appellant submitted that there was no corroboration of the evidence presented by the prosecution witnesses. He submitted that the 1st Appellant was convicted only on the basis that basis that it was unusual for him to be in Machakos together with his cousin and that no evidence was rendered to place him at the scene of the crime nor any evidence of communication between the Appellants. He contended that he was convicted on circumstantial evidence. He cited Section 24 of the ***Evidence Act***, **Bukenya and Others vs Republic vs Uganda** and **Abanga Onyango vs. R Cr App no 32 of 1990**.

48. In addition, it was submitted that the person who installed the CCTV camera and the security guard who were crucial witnesses were not called to testify. He opined that no one from the café was called to ascertain that he was there during the incident. He also contended that the Trial court failed to take into consideration the time spent in custody of 28 months contrary to Section 333(2) of the ***Criminal Procedure Code*** and **Michael Nthenge Kisina vs. Republic [2021] eKLR.**

49. The Respondent submitted on four major grounds in asking the court to quash the appeal and enhance the sentence. As to whether the charge sheet was defective, he submitted that it was not defective as count 1 and 3 disclosed a complete offence of breaking into a building therefore section 382 of the ***Criminal Procedure Code*** did apply. The Respondent contended that section 306 (a) of the ***Penal Code*** simply gives the elements of the offence and it is necessary for a separate count to be included to avoid duplicity. Reliance was placed on the case of **Rashid Salim vs Republic [2000] eKLR**. Further, that the charges were in tandem with evidence adduced in court which proved that the office of the DPP and the cyber café were broken into and computers and accessories stolen.

50. As to whether the prosecution had proven their case beyond reasonable doubt he affirmed the same and submitted that the four ingredients for completion of the crime were proven. He submitted that the office was broken into and referred to the evidence of PW1, PW2, PW3 and PW4 who corroborated the evidence of each other that the inner door of the ODPP had been broken. That PW4 corroborated PW2 and PW3's testimony that there was a strange padlock on the door.

51. On the second element of whether a shop had been broken into, he relied on PW2's testimony who testified that he noticed that the door to his shop was bent and the sliding door to his shop opened. On the third element, it was submitted that the element that the Appellants had broken into the office and the cybercafé was proven. He relied on the evidence of PW7 who recovered a grey bag and metal bar from the Appellants car and PW8's evidence that the grey paper bag was the one the thieves were seen carrying. He contended that PW8's evidence on the mobile data print showed that the Appellants were in Machakos at the time the crime was committed. On the fourth element of whether a felony was committed, he relied on PW1, PW2, PW3 and PW4's evidence that 11 computers were stolen from ODPP office and PW2's evidence that items were stolen from his shop and submitted that there was stealing.

52. In further submissions, the Respondent submitted that the electronic evidence relied on was produced within section 78A of the ***Evidence***

Act. He opined that PW5 took the court through the process of how the still photos were produced and even produced a certificate. He relied on the case of **Republic vs Abdallah Kahi [2019] eKLR** where he alleged the court stated that photographs can only be inadmissible had the witness failed to produce the certificate.

53. Lastly, as to whether the sentence passed was proper, he submitted that the same was not. While relying on section 14(1) of the ***Criminal Procedure Code***, he submitted that a concurrent sentence can only arise where the appellant has been convicted of an offence under the same charge arising from the same circumstances which is not the case in this matter.

Determination

54. This court has taken into consideration the pleadings that have been filed by the parties, the trial court record together with the submissions filed and find the following to be the questions that arise before this court;

a. Whether the charge sheet was defective

b. Whether the Appellants were convicted on circumstantial evidence

c. Whether the evidence was corroborated

d. Whether the CCTV evidence and the photographs were produced in accordance with the evidence Act

e. Whether the elements of stealing and breaking were considered.

f. Whether the sentence should be reviewed and/ or set aside

55. This being a first appeal, the court is expected to analyze and evaluated afresh all the evidence adduced before the lower court and draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32, Pandya -vs- Republic [1957] EA 336** and **Kiilu & Another vs. Republic [2005]1 KLR 174.**

56. In criminal cases, it is old hat that the standard of proof is beyond reasonable doubt and it was due to this that **Mativo, J** in **Elizabeth Waithiegeni Gatimu vs. Republic [2015] eKLR** expressed himself as hereunder:

> **"To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty…Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favorite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge."**

57. Lord Denning in **Miller vs. Ministry of Pensions, [1947] 2 ALL ER 372** had this to say:-

> **"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 proved beyond reasonable doubt, but nothing short of that will suffice."**

58. The first issue for determination in this appeal is whether the charge sheet was defective and if it is curable in the event that it is defective. Section 134 of the ***Criminal Procedure Code*** provides that;

> ***Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.***

59. The Court of Appeal in **Peter Ngure Mwangi vs. Republic [2014] eKLR** observed that;

> ***"A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archbold, Criminal Pleading, Evidence and Practice (40th Edn), page 52 paragraph 53, this Court stated in YONGO V R, (1983) eKLR that:***

"In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:

(i) when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,

(ii) when for such reason it does not accord with the evidence given at the trial.'

Further guidance is found in the case of PETER SABEM LEITU V R, CR.A NO. 482 OF 2007 (UR) where this Court held thus:

"The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant."

60. The Charge sheet in this case contains the different charges and the particulars of the offence necessary for giving reasonable information as to the nature or he offence charged of breaking into a building and committing a felony in count 1 and 3 contrary to section 306 (a) of the ***Penal Code*** as well as that of stealing from a locked office contrary to section 279 (g) of the ***Penal Code*** for count 2 and 4.

61. The Appellants, however, claim that the charge sheet is defective because it does not disclose the offence and that section 306(a) of the ***Penal Code*** only give the elements of the crime and not the punishment for the same. It is true that a charge sheet ought to expressly set out the punishment section. In this case, the punishment section was not expressly set out. While that was a defect in the charge sheet I find that no prejudice was thereby occasioned and none has been alleged.

62. As regards reasonable information as to the nature of the offence committed, I find that the felony committed has been defined as stealing. That is reasonable in the circumstances.

63. On the ingredients, the elements of the offence of breaking into a building and committing a felony as per the definition in section 306(a) of the ***Penal Code*** are breaking and entering. The section provides that;

a) a schoolhouse, shop, warehouse, store, office, counting-house, garage, pavilion, club, factory or workshop, or

b) any building belonging to a public body, or

c) any building or part of a building licensed for the sale of intoxicating liquor, or

d) a building which is adjacent to a dwelling-house and occupied with it but is not part of it, or any building used as a place of worship,

e) and commits a felony therein.

64. It is clear that the various elements in a) to d) above are disjunctive hence satisfaction of any element combined with e) will lead to an accused person being found guilty. I agree with the holding in **Michael Maundu Wambua vs. Republic [2006] eKLR,** where **Makhandia, J** (as he then was) Court expressed himself as follows**:**

"With respect I do not buy the appellant's interpretation of what amounts to "breaking". The breaking must not necessarily result into some sought of damage. What is critical is gaining access into a store against the wish of the owner and or without his permission. In the instant case, the appellant gained entry into the store using a master key. By using the master key to access the store which was not his and without having sought or obtained the permission of the owner (PW1) to my mind amounts to breaking in. Simply put the appellant by his own machinations gained unauthorized access to the store. That act amounted to "breaking in." In my view therefore the prosecution led sufficient evidence to show that the appellant broke into the store."

65. In this case the office that was allegedly broken into is that of the Office of the Director of Public Prosecutions which the court takes judicial notice that it is a public body. On the other hand, PW2 testified that he is an IT professional who runs a bureau and computer accessories thus his business will fall under the element of *"**shop, warehouse, store, office…"*** It follows that as regards the locus in quo satisfies the requirement under the said section.

66. Section 268 of the ***Penal Code*** defines "stealing"" in the following terms:

(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.

(2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say—

a. an intent permanently to deprive the general or special owner of the thing of it;

b. an intent to use the thing as a pledge or security;

c. an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;

d. an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;

e. in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner;

67. In this case, the items that were alleged to have been stolen were eleven (11) HP monitors and eleven (11) HP CPU all valued at Kshs. 900,000/- from the ODPP office and one computer laptops and projectors all valued at Kshs 425,000 from PW2. It is therefore clear from the evidence on record that the said items were stolen from the offices of the ODPP and PW2's premises.

68. The Appellants have taken issue with the fact that the certificates required under the ***Evidence Act*** were never produced thereby prejudicing them. Section 78A of the ***Evidence Act*** provides that;

(1) In any legal proceedings, electronic messages and digital material shall be admissible as evidence.

(2) The court shall not deny admissibility of evidence under subsection (1) only on the ground that it is not in its original form.

(3) In estimating the weight, if any, to be attached to electronic and digital evidence, under subsection (1), regard shall be had to—

a. the reliability of the manner in which the electronic and digital evidence was generated, stored or communicated;

b. the reliability of the manner in which the integrity of the electronic and digital evidence was maintained;

c. the manner in which the originator of the electronic and digital evidence was identified; and

d. any other relevant factor.

4) Electronic and digital evidence generated by a person in the ordinary course of business, or a copy or printout of or an extract from the electronic and digital evidence certified to be correct by a person in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organization or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.

69. In addition**,** Section 106(B) of the ***Evidence Act*** provides that;

(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as "computer output") shall be deemed to be also a document, if the condition mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.

(2) The conditions mentioned in subsection (1), in respect of a computer output, are the following—

a. the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;

b. during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

c. throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and

d. the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in paragraph (a) of subsection (2) was regularly performed by computers, whether—

a. combination of computers operating in succession over that period; or

b. by different computers operating in succession over that period; or

c. in any manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, then all computers used for that purpose during that period shall be treated for the purposes of this section to constitute a single computer and references in this sections to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—

a. identifying the electronic record containing the statement and describing the manner in which it was produced;

b. giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

c. dealing with any matters to which conditions mentioned in subsection (2) relate; and

d. purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.

(5) For the purpose of this section, information is supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of an appropriate equipment, whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purpose of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities.

70.

71. The provisions of section 106B aforesaid were interrogated in the case of

Republic vs. Barisa Wayu Matriguda [2011] eKLR where a compact disc (CD) was made from CCTV footage, and the court said:

"The decision in Republic vs. Barisa Wayu Matuguda has been followed in several matters at the High Court. I shall cite only two of them. In William Odhiambo Oduol vs. Independent Electoral & Boundaries Commission & 2 others (2013) eKLR, the issue was admissibility of a video recording done on a Nokia phone, which was then taken to Nairobi and the video recording was then developed to CD. The court noted that the video was recorded, saved in the internal memory of the phone, the phone was connected to a computer using a micro-USB data cable, the file was copied to an empty hard disk, an empty CD was then inserted into the computer CD write RAM, the video file was then written on the CD or VCD using a CD writing application. It was emphasized that it was important to trace the devices for audit purposes. It was held that the certificate has to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities, whichever was appropriate. In Nonny Gathoni Njenga & anor vs. Catherine Masitsa & anor (2014) eKLR, the court found that DVDs sought to be relied on were not accompanied by a certificate as required by the Evidence Act. Then there is R. vs. Robson & Harris (1972) 1 WLR 651, where the issue was the admissibility of tape recordings of alleged conversations between the defendants and a prosecution witness. It was held that in considering the question of admissibility the court was required to satisfy itself that what the prosecution alleged to be original tapes were shown, prima facie, to be original by evidence which defined and described the production and the history of the recording upto the moment of production in court."

72. Similarly, in the case of **Samwel Kazungu Kambi vs. Nelly Ilongo & 2 Others [2017] eKLR** the court said that:

"21. Sub-section (4) of Section 106B requires a certificate confirming the authenticity of the electronic record. Such a certificate should describe the manner of the production of the record or the particulars of the device. The certificate could also have the signature of the person in charge of the relevant device or the management of the relevant activities.

22. The source of the photocopies of the photographs annexed to the affidavit sworn by the Petitioner in support of the Petition was not disclosed. The device used to capture the images was unknown. The person who took the photographs was not named. The person who processed the images was not named. The Petitioner was not an eyewitness to the incident and he could not therefore tell the court that the photographs were a true reflection of the incident he witnessed."

73. In this case, PW5 stated the manner in which he was able to access the CCTV footage and how he was able to take the clips and/or photographs that were produced in court. He stated that he watched the footage and captured 43 pictures using VCR Mecha Player programme installed in the laptop. He also produced a certificate and report dated 15th May 2019 and another certificate dated 12the November 2018. According to the investigating officer, the CCTV footage was extracted from a backup that was found. Having considered the material on record, it is my finding that the conditions of section 106 B above were satisfied. The certificates are on record in accordance with the ***Evidence Act*** and the manner in which the material was extracted and the gazettement of the officers who handled the matter has not

been disputed.

74. In this case, however, none of the eye witnesses saw the Appellants committing the offence in question. Apart from the evidence from the CCTV cameras, the evidence was largely circumstantial. However, proof in criminal cases can either be by direct evidence or circumstantial evidence. When a witness, such as an eyewitness, asserts actual knowledge of a fact, that witness' testimony is direct evidence. On the other hand, evidence of facts and circumstances from which reasonable inferences may be drawn is circumstantial evidence. Therefore, where circumstantial evidence meets the legal threshold, it may well be a basis for finding the accused person culpable of the offence charged. In fact, in **Neema Mwandoro Ndurya v. R [2008] eKLR**, the Court of Appeal cited with approval the case of **R vs. Taylor Weaver and Donovan (1928) 21 Cr. App. R 20** where the court stated that:

> **"Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."**

75. In this case, as stated above, in the absence of any direct evidence linking the Appellants save for the CCTV, this court must rely on the circumstantial evidence if the case against the Appellants is to be proved. Whereas it is appreciated that a charge may be sustained based on circumstantial evidence the courts have established certain threshold to be met if a conviction is to be based thereon. In **Sawe –vs- Rep [2003] KLR 364** the Court of Appeal held.

> **"In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt; Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on; The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused."**

76. In **R. vs. Kipkering Arap Koske & Another [1949] 16 EACA 135,** in the Court of Appeal for Eastern Africa had this to say:

> **"In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."**

77. In **Abanga Alias Onyango vs. Rep CR. A No.32 of 1990 (UR)** the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction. These are:

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

78. In **Mwangi vs. Republic [1983] KLR 327 Madan, Potter JJA** and **Chesoni Ag. J. A**. held:-

> **"In order to draw the inference of the accused's guilt from circumstantial evidence, there must be no other co -existing circumstances which would weaken or destroy the inference. The circumstantial evidence in this case was unreliable. It was not of a conclusive nature or tendency and should not have been acted on to sustain the conviction and sentence of the accused."**

79. Therefore, for this court to find the accused guilty the inculpatory facts must be incompatible with innocence and incapable of explanation upon any other hypothesis than that of guilt. This proposition was well stated in the case of **Simon Musoke vs. Republic [1958] EA 715** as follows:

> **"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."**

80. In **Teper v. R [1952] AC at p. 489** the Court had this to say:

> **"Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference."**

81. In this case, the learned trial magistrate seemed not to have placed much premium on the grey bag that was recovered from the 1st Appellant's vehicle as being the same one in the CCTV Camera since the camera did not capture it at a close range. However, her findings as regards the 1st appellant's role in the commission of the offence was that the phone data showed that he entered Machakos County at around 3pm, and the Hotel at 7.36pm where he stayed till 7.21pm. At 7.27pm he was out till 7.36pm. Around that time, the CCTV camera at the building captured the image of the person the prosecution contended was him. The Court found that the 1st Appellant appeared to have spent

a lot of time at this location, exiting at 8.15pm. To the Court, the 1st Appellant clearly, hardly stayed at the hotel. The Court's view was that it would have been sheer coincidence that cousins and friends would be at one location at the same time when there was strong evidence connecting the relative or acquaintance with the offence in question. To the Court this evidence leads to no other conclusion than that they acted in concert to execute a common purpose of breaking into and stealing from the Cyber Cafe and the ODPP's office.

82. It is clear from the judgement that there was no definite finding by the learned trial magistrate that the 1st Appellant was the person who was in the CCTV camera. What cooked the 1st Appellant's goose was the fact that his evidence that he was at Green Garden Hotel from 8pm did tally with the call data which seemed to place him outside the Hotel. Apart from that was the fact that at that same time the breaking was being committed in which according to the Court none other than his cousin, the 2nd Appellant, was involved. As regards the first issue even if the 1st Appellant's evidence that he was at the Hotel was untrue that may not necessarily prove that he then must have been involved in the commission of the offence.

83. In this case the first question is whether the circumstantial evidence was overwhelming. In these circumstances, can it be said that the circumstantial evidence against the 1st Appellant was overwhelming? In other words, can these facts be said to be incompatible with the innocence of the 1st Appellant and incapable of explanation upon any other reasonable hypotheses than that of his guilt? Or can it be said that there exist other existing circumstances either from the prosecution or the defence that weaken the chain of circumstances relied on?

84. Having considered the evidence before me, even if considered alone without the denial by the 1st Appellant, I must say that the same cannot be said to amount to overwhelming circumstantial evidence. Whereas the evidence of the 1st Appellant may not have been very satisfactory as regards his whereabouts at the time of the commission of the offence, the burden was clearly upon the prosecution to prove each and every ingredient of the offence. Even if his evidence is not convincing and may well arouse some suspicion, that suspicion alone cannot be the basis of a conviction. I rely on the decision of the Court of Appeal in **PON vs. Republic [2019] eKLR** where the Court expressed itself as hereunder:

> **"We are of the considered view that the instances of what was presented as circumstantial evidence were below the threshold enunciated in the leading cases we have cited in this judgment, namely Rex V Kipkerring (supra), Simoni Musoke V R. (supra) and Omar Mzungu Chimera V. R (supra). The evidence does not amount to a compelling rational inference of the appellant's guilt. The facts do not lead to one irresistible conclusion that the appellant and no one else could have committed the crime, taking into consideration the natural course of human conduct. The evidence was not compelling, credible or cogent. There was no evidence of the appellant's or the deceased's movement prior to the incident…In conclusion, and to reiterate what the courts have stated time without end, no amount of evidence based on suspicion, no matter how strong may be a basis for a conviction. See: Sawe V. Republic [2003] KLR 364. Suspicion, even reasonable suspicion is a legal standard of proof not known in our criminal law. Either a fact is proved beyond reasonable doubt or it is not. The appellant may have acted strangely upon his return from Sierra Leone, for instance, walking with a metal bar and sleeping in the guest house yet he had a house. His warmth and attitude towards the deceased may have changed; he may have had little interest in the issue of the lost child; he may even have denied knowing J. But all these only amount to suspicion and not evidence upon which a conviction may be found."**

85. In **Trikabi vs. Uganda [1975] EA 60**, it was held that:

> **"[The appellant] left the village and his home very soon after the fatal attack, and could not be found until he returned several months later. The assessors and the Judge were satisfied that this conduct on the appellant's part was indicative of his guilt and corroborative of the truth of the deceased's dying declaration. They were satisfied that the appellant's explanation for his sudden departure, and long absence, from his home, that he had gone to look after a sick sister, was a lie; and explanation first put forward in his own unsworn statement in his defence. This case has caused us much concern, but we are unable to say, after anxious consideration, that the judge was wrong in holding that the appellant's conduct, in leaving his house and disappearing for several months, knowing of the attack on the deceased, was sufficient corroboration of the deceased's dying declaration that he (the appellant) was the man who had attacked him, a declaration which the judge believed to be true. The attack took place in broad daylight and the appellant was well known to the deceased, so that the deceased's identification of the appellant as his attacker is unlikely to have been mistaken."**

86. Similarly, in **Malowa vs. The Republic [1980] KLR 110**, **Madan, Law and Potter, JJA** held that:

> **"The judge held, on the authority of Terikabi vs. Uganda [1975] EA 60, that corroboration of the evidence of Paulina and of the dying declarations of Blazio was provided by the conduct of Malowa, in disappearing from his home immediately after the murder to avoid arrest, and in remaining absent for six months; and he was left with no reasonable doubt that Malowa was guilty of the murder of Blazio. We see no reason to differ."**

87. In **Robert Achapa Okelo vs. Republic Kisumu Court of Appeal Criminal Appeal No. 3 of 1999** the Court of Appeal expressed itself as hereunder:

> **"In this appeal the superior court convicted the appellant of the murder of Margaret Atieno Ouma which was said to have occurred at Kondele Estate in Kisumu District on 14th June, 1993. The evidence relied on by the trial Judge (Wambilyanga, J) in convicting the appellant was all circumstantial. That evidence did not, however, irresistibly point to the appellant to the exclusion of any other hypothesis as the killer of the deceased. It was mostly guess work based on traditional values and principles like failure by the appellant to attend the deceased's funeral, the appellant's going away from and returning to the place where the other members of the family were seated and so on. We agree with Mr Karanja for the State that these activities did not constitute evidence from which an inference of guilt could be safely drawn. The State having conceded the appeal there was no need for Mr Menezes to argue his grounds of appeal. Consequently, the appeal is allowed, the conviction**

quashed and the sentence set aside. The appellant shall be set free forthwith unless he is otherwise lawfully held."

88. As was held by the Court of Appeal in **Joan Chebichii Sawe vs Republic [2003] eKLR**:

"The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt…Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."

89. In that case the court relied on **Mary Wanjiku Gichira vs. Republic,** Criminal Appeal No 17 of 1998, where it was held that:

"suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused's freedom and at times life."

90. The rationale for this position was explained in **John Mutua Munyoki vs. Republic [2017] eKLR** where the Court of Appeal opined that:

"…in all criminal cases, the prosecution has the task of proving its case against an accused person beyond reasonable doubt and it is a burden the prosecution must discharge in relation to each and every ingredient of the particular offence charged."

91. As was held by the Court of Appeal in **Moses Nato Raphael vs. Republic [2015] eKLR**:

"What then amounts to "reasonable doubt"? This issue was addressed by Lord Denning in Miller v. Ministry of Pensions, [1947] 2 ALL ER 372 where he stated:-

'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 proved beyond reasonable doubt, but nothing short of that will suffice.'"

92. While it may well be that the circumstances of this case cast strong suspicion on the 1st Appellant as having had some link with what his cousin might have been planning to do, I find that the circumstances relied upon by the prosecution fell short of the standard expected in order to convict an accused on circumstantial evidence. Accordingly, I hereby set aside his sentence, quash the sentence and direct that he be at liberty unless otherwise lawfully held.

93. As for the 2nd Appellant, it was the testimony of PW1 that on the material day, PW1 shared a lift with the 2nd Appellant who was by then dressed in a black suit. There was no express denial by the 2nd Appellant that on the material day he was wearing a black suit at lunch time. He however admitted that he was in PW2's shop asking about the cost of the laptops. He also admitted that the clothings recovered from his house were the ones he had on the day the offence was committed. From the CCTV footage, it was confirmed by the prosecution witnesses that he was the man seen carrying loaded black bags yet he had nothing when getting into the building. As pointed out by the learned trial magistrate, the CCTV footage revealed an image of a person resembling the 2nd Appellant some minutes after 5pm dressed in a blue shirt and black pair of trousers but some minutes after 6pm a man identified as the same suspect, now adorning a red pull over and jungle hat was seen and that the 2nd Appellant admitted that he had the attire at the said building. I agree with the learned trial magistrate that the manner in which the 2nd Appellant conducted himself by changing his clothes within a short span of time was clearly unusual. Whereas being untruthful in one's testimony may not necessarily be an indication of guilt, where the conduct amounts to attempts to conceal one's identity, the same may well corroborate the prosecution's case unless a reasonable explanation is offered for the unusual conduct.

94. I have considered the evidence by the prosecution as regards the 2nd Appellant and I find that though there was no eye witness who saw him committing the offence, the evidence from PW1 and PW2 taken together with the evidence from the CCTV footage was so overwhelming and pointed to his guilt. I therefore have no reason to interfere with the conviction of the 2nd Appellant.

95. As regards the sentence, the learned trial magistrate directed that the same would run concurrently with the sentence which the Appellants were already serving. Section 14 of the ***Criminal Procedure Code*** provides for circumstances in which a court can direct sentences to run concurrently or consecutively. Section 14 provides in part as follows:-

"(1) Subject to sub-section (3) when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.

(3) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.

Except in cases to which section 7(1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at

one trial, consecutive sentences:-

> ***a. of imprisonment which amount in the aggregate to more that fourteen years or twice the amount of imprisonment which the court in the exercise of its ordinary jurisdiction, is competent to impose whichever is less or***
>
> ***b. of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose."***

96. In the case of **Sawedi Mukasa s/o Abdulla Aligwaisa [1946] 13 EACA 97**, the then Court of Appeal for Eastern Africa in a judgment read by **Sir Joseph Sheridan** stated that the practice is that where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, to impose concurrent sentences. That is still good practice.

97. The Court of Appeal in **Peter Mbugua Kabui vs. Republic [2016] eKLR** expressed itself on the matter as hereunder:

> **"As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment. It is our considered view that the exception in Section 14 (3) of the Criminal Procedure Code is inapplicable to this case in light of the provisions of Section 7 (1) of the Criminal Procedure Code. We further observe that Section 14 of the Criminal Procedure Code stipulates that for purposes of an appeal, the aggregate of consecutive sentences imposed in case of convictions for several offences at one trial, shall be deemed to be a single sentence. We take the view that given the circumstances of this case, the consecutive sentences totalling 20 years imposed on the appellant, cannot said to be excessive. In any event, as we have pointed out earlier, severity of sentence is a question of fact and this Court has no jurisdiction to consider issues of fact in a second appeal. Is the sentence illegal or unlawful" We find that the sentence was legal and lawful, and we have no legal basis for interfering with the same."**

98. In this case, the Appellants were already serving sentences. The offences in question cannot be said to have formed a single transaction. In my view there was no basis for directing them to run concurrently. However, in **JJW v. Republic, Cr. App. No 11 of 2011,** it was held that notwithstanding the fact that section 354(3) of the ***Criminal Procedure Code*** empowers the High Court to enhance or alter the nature of the sentence imposed by the trial court, in the absence of an appeal against sentence, the court must warn the appellant before it enhances the sentence. The Court stated:

> **"It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 354 (3) (ii) and (iii) of the Criminal Procedure Code. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal."**

99. And in **Samwel Mbugua Kihwanga vs. Republic, Cr. App. No. 239 of 2011,** the Court explained that although the practice of warning the appellant before enhancing the sentence was not a requirement of law, it was a matter of practice that had gained notoriety and served to put the appellant on notice of the consequences that would befall him depending on the outcome of the appeal.

100. Since the 2nd Appellant was no warned of the consequences of him proceeding with the appeal in the circumstances in which he stood the risk of having the sentence enhanced, I decline to interfere with the sentence. However, the proviso to section 333(2) of the ***Criminal Procedure Code*** provides as hereunder:

> ***(1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.***
>
> ***(2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.***

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

101. It is therefore clear that it is mandatory that the period which an accused has been held in custody prior to being sentenced must be taken into account in meting out the sentence. While the court may in its discretion decide that the sentence shall run from the date of sentencing or conviction, it is my view that in departing from the above provisions, the court is obliged to give reasons for doing so. However, where the sentence does not indicate the date from which it ought to run the presumption must be in favour of the accused that the same will be computed inclusive of the period spent in custody.

102. I associate myself with the decision in **Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR** where the Court of Appeal held that:

> **"The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by *section 333(2)* of the Criminal Procedure Code. By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."**

103. The same Court in **Bethwel Wilson Kibor vs. Republic [2009] eKLR** expressed itself as follows:

> **"By proviso to *section 333(2)* of Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. *Ombija, J*. who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held."**

104. According to ***The Judiciary Sentencing Policy Guidelines***:

> ***The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.***

105. In this case, from the charge sheet, the Appellants were arrested on 9th October, 2018 and there is no evidence that they were released on bond. However, the learned trial magistrate stated that she had taken into account the duration that the applicant was in custody. While I agree that the learned trial magistrate ought to have gone further and indicated what exactly was taken into account, in this case the 2nd Appellant was liable to imprisonment for 7 years but was sentenced to serve 3 years. It is my view that taking into account the circumstances of this case, the sentence was reasonably lenient and the learned trial magistrate having expressly stated that she took into account the period spent in custody, based on my subjection of the evidence to a re-evaluation as I am enjoined to do, I am not prepared to interfere with the sentence either way.

106. Consequently, while the appeal by the 1st appellant succeeds, the 2nd appellant's appeal fails.

107. It is so ordered.

JUDGEMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 23RD DAY OF FEBRUARY, 2022.

G V ODUNGA

JUDGE

DELIVERED IN THE PRESENCE OF:

MISS ALUDA FOR THE APPELLANTS

MR NGETICH FOR THE RESPONDENT

CA SUSAN