Bett & 2 others v Republic (Criminal Appeal E004 of 2020 & 45 & 46 of 2021 (Consolidated)) [2022] KEHC 10477 (KLR) (29 July 2022) (Judgment)

Neutral citation: [2022] KEHC 10477 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPEAL E004 OF 2020 & 45 & 46 OF 2021 (CONSOLIDATED)

RL KORIR, J

JULY 29, 2022

BETWEEN

ISAAC KIPNGETICH BETT ALIAS KAREDIO ..... APPLICANT

AND

WESLEY KIPNGENO KOECH ..... 1ST APPELLANT

EZEKIEL OMBASO OMBWOGE ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the Conviction and Sentence in Criminal Case Number 434 of 2010 by Hon. T. Okello the Principal Magistrate at Bomet)

JUDGMENT

1. This matter has been in the court system for 12 years now. The Appellants along with 4 others were first charged before the Principal Magistrate's Court in Bomet on 5th January 2010. They appeared before Hon. J. Kwena (Senior Resident Magistrate), Hon. M.O. Okuche (Resident Magistrate) and Hon. W. Nyamu (Senior Principal Magistrate) before they were convicted and Sentenced on the mandatory death Sentence by Hon. T .Okello (Principal Magistrate). The Judgment was appealed in Kericho High Court Appeal Number 44 of 2011 where the conviction and Sentence of the trial court was upheld by the 2 Judge bench of Sergon J and Ongaya J. This was further appealed in the Court of Appeal in Nyeri in Criminal Appeal Number 216 of 2013 where the court found that Hon. Justice Ongaya had no jurisdiction to hear the Appeal. The Court of Appeal directed the matter to be remitted back to the High Court for rehearing hence the present Judgment.

2. The Appellants were convicted of the offence of robbery with violence contrary to section 296 (2) of the *Penal Code*. The particulars of the Charge were that on the night of 22nd /23rd November 2009

at Chemosit Estate in Kericho District within Rift Valley Province, jointly with others not before court while armed with dangerous weapons namely pistol, machete, iron bars, axes, panga and rungu robbed one Alfred Kiplangat Longei of one computer laptop make HP G50, three (3) mobile phones make Nokia 5000 serial number xxxx Nokia 1200 serial number xxxx, Motorola L6 serial NUMBER xxxx and a brown leather wallet containing Kshs 300 all valued at Kenya Shillings 74,000 and at or immediately before or immediately after the time of such robbery used actual violence to the said Alfred Kiplangat Longei.

3. The 3rd Appellant faced an alternative Charge of handling stolen property contrary to section 322 (2) of the *Penal Code*. The particulars of the Charge were that on 27th May 2010, at Kericho township, in Kericho district, within Rift Valley Province, otherwise than in the course of stealing, dishonestly retained one mobile phone make Nokia 5000 serial number xxxx valued at Kshs 6,250 knowing or having reason to believe it to be a stolen item.

4. The Appellants pleaded not guilty to the charges before the trial court, and a full hearing was conducted. The prosecution called nine (9) witnesses in support of its case.

5. At the close of the prosecution case, the trial court ruled that a prima facie case had been established against the 1st, 2nd, 4th and 7th accused persons and they were put on their defence. The trial court further ruled that the prosecution had not established a prima facie case against the 3rd, 5th and 6th accused persons and they were acquitted under Section 210 of the Criminal Procedure Code.

6. At the conclusion of the trial, the trial court held that the prosecution had failed to prove their case against the 4th accused person and he was acquitted under Section 215 of the *Criminal Procedure Code*. The trial court further held that the prosecution had proved their case against the 1st, 2nd and 7th accused (now 1st, 2nd and 3rd Appellants respectively) and they were convicted and sentenced to suffer death.

7. Being dissatisfied with the Conviction and Sentence, the 1st accused, now 1st Appellant appealed on the following grounds:

    i. That the learned trial magistrate erred in law and fact by failing to find that the appellant's identification was not properly conducted.

    ii. That the learned trial magistrate erred in law and fact by relying on the doctrine of recent possession while failing to appreciate that the procedure used to make the inventory was erroneous.

    iii. That the learned trial magistrate erred in law and fact by failing to find that the Safaricom data print outs were not presented in court by the maker.

    iv. That the learned trial magistrate erred in both law and fact by sentencing the appellant with the mandatory death sentence.

8. The 2nd accused person, now 2nd Appellant appealed on the following grounds:

    i. That the learned trial magistrate erred in law and fact by failing to note that documentary evidence adduced by the prosecution did not adhere with Sections 35, 78A (4) and 77 of the *Evidence Act*, Cap 80, Laws of Kenya.

    ii. That the learned trial magistrate erred in law and fact by convicting me without noting that the prosecution failed to establish the user of the alleged phone line that was tracked.

    iii. That the learned trial magistrate erred in law and fact by failing to appreciate Article 27 (1) of the *Constitution* of Kenya.

iv. That the learned trial magistrate erred in law and fact when he failed to note that the line that was unregistered was not inserted in the robbed Nokia 5000 as per the print out.

v. That the learned trial magistrate erred in law and fact when he allowed the print out evidence without Certification under Section 65 (6) of the *Evidence Act*, Cap 80, Laws of Kenya.

vi. That the learned trial magistrate erred in law and fact by rejecting my sworn statement and Defence without giving a cogent reason.

9. The 7th accused person, now 3rd Appellant appealed on the following paraphrased grounds:

i. That the learned trial magistrate erred in law and fact when he convicted me without evidence to link me with the crime.

ii. That the learned trial magistrate erred in law and fact when he convicted me while relying/ invoking the doctrine of recent possession that was misapplied in this case.

iii. That the learned trial magistrate erred in law and fact when he shifted the burden of proof upon me when such burden ought to bestowed upon the prosecution's shoulders.

iv. That the learned trial magistrate erred in law and fact when he dismissed my defence.

10. As already stated, the Appeal was heard and Judgment was delivered on 25th October 2013 by the two Judge bench of Hon. Justice Sergon and Hon. Justice Ongaya where the Appeal was dismissed and upon further appeal, the Court of Appeal ordered the Appeal to be remitted back to the high court for re-hearing, hence the current proceedings.

11. The 3 Appellants then filed a joint Supplementary Memorandum of Appeal dated 2nd September 2021 and they jointly appealed on the following paraphrased grounds:

i. That the learned trial magistrate erred in law and fact by failing to find that Sections 78A, 3 (a), (b), (c) and (d) were violated.

ii. That the learned trial magistrate erred in law and fact by failing to find that Section 3 of the *Evidence Act* in respect to the 3rd Appellant was violated.

12. This being the first appellate court, I have a duty to re-evaluate the evidence on record. This duty was clearly stated by the Court of Appeal in the case of *Kiilu & Another v Republic* (2005)1 KLR 174, thus:

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

13. With the above direction in mind, I now briefly recap the case in the trial court.

The Prosecution's Case.

14. The Complainant, Alfred Longei (PW1) testified that on the material day, he was at home asleep with his wife and children when at around 1 a.m. to 2 a.m., he heard people walking along the corridor of his house. It was his testimony that they shook the door until it opened. That three people got into his room and robbed them mobile phones which were on the table i.e. Motorola L6, Nokia 1200 and Nokia 5000. It was his testimony that they also took a laptop computer HP G 50.

15. It was the testimony of PW1 that he was hit with a rungu and when his wife pleaded with them not to kill him, she was slapped and hit with a rungu too. PW1 testified that two attackers ordered his wife to produce her handbag and followed her to the wardrobe. The remaining attacker stayed with him. That at this point he saw one of the attackers having a jungle jacket belonging to the APs. It was his testimony that he saw one assailant well as there were security lights. He further stated that the curtains were transparent and that there was sufficient light in the room. It was his further testimony that the stolen items were valued at Kshs 74,000.

16. PW1 testified that he then ran away to a club that was about 500 meters away to call other people. That he followed a short cut and was pursued by three assailants and one of them said that he be shot. PW1 further testified that he saw one of the three assailants well as he was the one who had stayed with him for a while in the house and spent quite some time with him. He stated that he could also identify the other two.

17. It was the testimony of PW1 that he was called for an Identification Parade on 28th December 2009 and found 10 people on the parade. It was his further testimony that he identified one of the people who had asked for the keys and beat him up. He stated that he was able to identify him because he had stayed with him for a long time. Further that the suspect was told to repeat what he said during the robbery and as a result he was able to pick out his voice. PW1 further testified that the sizes of the people in the parade were similar and that he identified the 1st accused person by touching him on the shoulder.

18. PW1 testified that he was later called to identify a laptop that had been recovered and found that it was not his. That later, his mobile phone was recovered and he was able to identify it because of the colour and initials "AL". It was his testimony that he gave the receipt of its purchase to the police officers and that the serial number for the mobile phone was xxxx.

19. PW1 testified that he went to hospital and was treated. That the P3 form was filled on 27th November, 2009 at Kericho District Hospital.

20. Joyce Cherotich Sigei (PW2) testified that she was married to PW1 and that on the material day at around 1 a.m., when asleep, they heard a loud bang at the door. That the door was eventually opened and three people got into the bedroom and ordered them to co-operate or be killed. That the assailants approached PW1 and asked for mobile phones Motorola L6, Nokia 5000 and Nokia 1200 (which belonged to PW2). It was PW2's testimony that PW1 was then hit with a rungu on the jaw.

21. PW2 testified that there were security lights outside next to the window which lit the bedroom. That she saw the1st accused person hit PW1 as he was the same person who had told them to co-operate. It was PW2's testimony that she was beaten by the 2nd and 4th accused persons as she went to collect her wallet. That she gave them the wallet which had Kshs 400 inside. It was her further testimony that the 2nd and 4th accused persons ran away thereafter.

22. PW2 testified that she and her husband were later called to Kericho Police Station where they recorded their statements and also attended an Identification Parade on 12th December 2009 in which she

identified the 1st accused person. She stated that he was the one who asked where the phones were and also the person who had beaten up PW1. PW2 further stated that she did not go to the hospital.

23. Peter Kipchirchir Chepkwony (PW3) was a security guard at Unilever Company who was assigned to guard the compound of PW1 and had worked for PW1 for a period of 6 years. He testified that on the material day, he was on patrol when somebody got into the fenced compound. That he saw the person behind the house as he was near the security light. PW3 testified that he tried to stop the intruder but some other people came from his back and choked him. That one of the people who came from behind had a gun. He further testified that he was unable to identify the other intruders.

24. PW3 further testified that they took him to PW1's vehicle and one of them stayed with him as the other ones went to the house. That soon the attacker who was with him left. It was his testimony that he jumped over the fence and went to call other guards. It was PW3's testimony that after he raised the alarm he saw three people coming out of the house. PW3 testified that he was unable to identify any of the 4 assailants.

25. Sergeant Thomas Juje (PW4) testified that he was in charge of Kenyatta National Hospital Police Force and that he was initially at Jamji Police Patrol Base. That on the material day at about 1 a.m., he was on patrol at Jamji when he was informed that PW1 had been attacked. It was his testimony that he rushed to the scene of crime and found PW1 and PW3. That he tried chasing after the attackers but did not succeed. He further testified that PW1 had informed him that he had been attacked.

26. I.P Reuben Onchoka (PW5) testified that he was attached to CID offices and seconded to Telkom Kenya. It was his further testimony that he was based at Kericho Police Station CID. That on 28th December 2009, the investigating officer, CPL Murunga (PW9) asked him to conduct an identification parade. The 1st accused person was in the cell and was informed that an identification parade was about to be conducted and he accepted to be in the parade and signed the identification parade form. PW5 testified that PW1 and PW2 identified the 1st accused person who was placed between the 5th and 6th person in the parade.

27. PW5 testified that on 30th January 2010 he was asked to conduct an identification parade in respect of the 3rd accused person. That the 3rd accused person refused to appear in the parade as he had a wound on the left side of his head. As a result, PW5 was unable to conduct the parade.

28. PW5 further testified that the 1st accused person was known to him as he had 8 previous convictions. That he also knew the 2nd accused person as he had a previous case of robbery with violence.

29. Andrew Njagi (PW6) testified that he was attached to the CID offices within Bomet Police Station and was part of the investigation team for the incident of robbery with violence which occurred on 26th February 2010. That they interviewed the people who were there the previous day and were told that the robbery involved 4 people, one person was known and the other three were unknown. It was PW6's testimony that on 1st March 2010 while at Bomet town, he spotted a person who fitted the description of the person whose picture he had. That he was able to arrest three people with the help of other police officers. He further testified that the person in the photo was the 2nd accused person.

30. PW6 testified that upon interrogation, the suspects revealed that they were visitors of the person that the police had been looking for. PW6 stated that they had part of the items that had been stolen in the robbery. It was PW6's further testimony that they did not visit the houses but one of them wore a jacket and shoes that were exhibits in their case.

31. CPL Chebet Winrose (PW7) testified that she was attached to the CID office in Kericho. It was PW7's testimony that on 16th November 2009, PW1 reported that he had been attacked by many armed

robbers and that they stole mobile phones i.e. Motorola L6, Nokia 1200, Nokia 5000, a laptop and a wallet containing Kshs 300. PW1 further reported that the robbers used force on him thereby injuring him.

32. PW7 testified that they started investigations on the stolen phones. That two of the mobile phones were working but not with the numbers/lines of PW1 and PW2. It was PW7's further testimony that the Motorola L6 had a line 0717287383 and Nokia 5000 had xxxx. PW7 testified that on 1st December 2009, she sent Kshs 1000 to the line xxxx to help ascertain the owner but it was discovered that the line was not registered by M-pesa. This was later corroborated by PW9.

33. It was PW7's testimony that the 1st accused person was arrested on 16th December 2009, he gave the police his phone numbers. That one of the phone numbers was the same one that she had sent money to. She testified that the 1st Accused had the SIM plate for that line. PW7 testified that it connected the 1st accused person with the Motorola L6 that was stolen from the complainant.

34. PW7 testified that when the 2nd accused person was arrested and brought to their office, he said that the number xxxx was his and from the print out from Safaricom, it showed that the two lines were communicating from time to time. That the 2nd accused person gave two other lines that he had been using in the Nokia 5000, number xxxx which was being investigated. It was PW7's testimony that the Nokia 5000 had not been used until May 2010. That when the Nokia 5000 was found it was being used by the number xxxx which was registered under the 7th accused person's name. PW7 testified that the 7th accused person was thereafter arrested and the police took the phone. It was PW7's further testified that the phone belonged to the complainant.

35. Yegon Kirwa (PW8) testified that he was a clinical officer for 15 years and was based at Kericho District Hospital. That on 27th November 2009, he filled a P3 form for PW1 after examining him. PW8 further testified that PW1's left chin was tender and swollen with bruises, the mucus membrane was bruised from inside the nose and that the injuries were about 5 days old. It was PW8's testimony that the injuries to the back were caused by a blunt object and that PW1 had been treated at Kericho District Hospital.

36. George Murunga (PW9) testified that he was attached to the Divisional CID headquarters in Kericho performing general duties. That on 26th November 2009, while in the office, PW1 and PW2 reported that they had been attacked by robbers on the night of 22nd November 2009 who were armed with clubs and a gun. That they began investigating the incident through collection of intelligence.

37. PW9 testified that they visited the suspects in their homes i.e. in the areas of Kericho, Sotik, Litein and Bomet. That they wrote to Safaricom and gave them the serial numbers of the stolen mobile phones to ascertain if they were in use. It was PW9's testimony that they got a report that two mobile phones were in use but with different sim cards. The Motorola L6 used xxx and the number was not registered although the person who used it was in Motibo Estate, Kericho. That the Nokia 5000 used xxxx and the person who used it was between Bomet-Kericho-Litein. PW9 testified that they got court orders to investigate the two lines i.e. xxxx and xxxx.

38. It was PW9's testimony that on 16th December 2009, they arrested the 1st accused person and recovered a blood stained metal bar, a brown leather wallet, pressure detector, 3 photographs, a small notebook, panga and a slasher. That they also took 4 sim card plates and a Nokia mobile phone. The serial numbers for the sim plates were xxxx, xxxx, xxxx and xxxx. PW9 further testified that the 1st accused person and his wife were present when the recovery was made.

39. PW9 testified that the 1st accused person gave them a picture which contained the 2nd and 3rd accused persons. That he told them where all the other accused persons lived i.e. the 2nd accused person lived in

Bomet and Kaplong, the 3rd accused person lived in Kericho and Litein, the 4th accused person lived in Bomet and Kericho, the 5th accused person stayed with him in the same place, and that the 6th accused person was involved with him in a previous robbery. It was PW9's testimony that the 1st accused person gave them mobile numbers for the accused persons i.e. xxxx for the 3rd accused person, xxxx for the 2nd accused person and xxxx for the 4th accused person.

40. It was PW9's testimony that the sim card plate bearing the number xxxx and serial number xxxx was the one they were tracking. That the sim card plate was found in the house of the 1st accused person and it was the same one being used in the Motorola L6. That the 1st accused person told them that he got the phone in the robbery at Jamji and sold it. He testified that upon doing analysis, they discovered that when that line was in the Nokia 5000, it communicated with the 2nd, 3rd and 4th accused persons frequently.

41. PW9 testified that on 7th March 2010, he was handed several suspects from Bomet Police Station. That he investigated them and asked them to furnish him with their phone numbers that they had come with. It was at this point that he realized that xxxx and xxxx belonged to the 2nd accused person. That the sim card for xxxx had been recovered from the inventory of the 1st and 2nd accused person. It was PW9's further testimony that of the 4 suspects that he had been handed over, only the 2nd and the 4th accused persons were involved in this case. That the number xxxx was the sim card that had been used in the Nokia 5000 and he used it to communicate with the 1st, 3rd and 4th accused persons.

42. PW9 testified that the 1st accused person was identified by the complainant (PW1) during the identification parade.

43. It was PW9's testimony that on 27th May 2010, Safaricom informed him that the Nokia 5000 was being used within Kericho town and it was being used by the number xxxx registered in the names of Ezekiel Ombaso Ombwogi. The said Ezekiel Ombaso Ombwogi was later arrested while in possession of the Nokia 5000. It was PW9's further testimony that the complainant identified the Nokia 5000 as the one that he had been robbed.

The Prosecution's Submissions.

44. The Prosecution submitted that it was not in dispute that PW1 and PW2 were violently robbed of their property amounting to Kshs 74,000 and that during the said robbery the robbers assaulted the victims. It was the Prosecution's further submission that a P3 form was filled and that the victims testified that the robbers were armed with rungus, sticks, metal bars and a gun.

45. It was the Prosecution's submission that PW1 produced receipts showing ownership of the stolen items and that it was not in dispute that the stolen items belonged to the victim.

46. The Prosecution submitted that the evidence of the Identification Parade was cogent and correct and that the trial court ought to have rightly considered the same as being proof of proper identification. That PW5 testified as to how he scrupulously conducted the Identification Parade and that the victims correctly identified the 1st appellant by touching them.

47. The Prosecution submitted that the sim card plate (exhibit 8) was recovered from the house of the 1st appellant. That the said sim card was used in one of the stolen phones, Motorola L6 which belonged to the victim. That under the doctrine of recent possession, the 1st appellant is deemed to have been part of the robbers.

48. It was the Prosecution's submission that the 1st appellant was rightfully convicted and sentenced under Section 296 (2) of the *Penal Code*, Cap 63 of the Laws of Kenya which imposes a mandatory death sentence. That the 1st appellant had a previous conviction record and that he did not bother to mitigate.

The 1St Appellant/ 1St Accused's Defence.

49. The 1st Accused (Isaac Kipngetich Bett) testified as DW1 He testified that on 16th December 2009, he saw two people going to his house. That when he approached them, they informed him that they were police officers. That they later handcuffed him and took him to Kericho Police Station. It was the 1st Accused's further testimony that at around 6 p.m., they took his wife to their house and conducted a search where they took photos and other things. That they then put him and his wife in the cells for two days. It was his further testimony that the police wrote an inventory and forced them to sign it. He further stated that he was informed to implicate people that he did not know and that he was being charged for an offence that he knew nothing about. He produced his statement as D. Exh. 1.

The 1St Appellant/ 1St Accused's Submissions On Appeal

50. The 1st Appellant submitted that he agreed with the trial court that there was insufficient light to enable the victims identify him. That for the charge of robbery with violence to be correctly proved, identification of the assailant must be proved positively. He further submitted that the police were in possession of his picture before they conducted the identification parade and it was safe to assume that the parade was compromised. It was the 1st Appellant's further submission that the factors that the court should consider in interrogating whether visual identification was positive were stated in the celebrated case of *Republic v Turnbull & Others* (1976) 3 ALL ER 549.

51. It was the 1st Appellant's submission that it was important for the owner of the M-pesa outlet to come to court and testify. That the arresting officer (PW7) should have demonstrated to the court that indeed he withdrew the money. It was his further submission that PW7 would have simply produced a photocopy of the page showing the details and identity of the person who withdrew the money and that failure to do so cast a lot of doubt as to the guilt of the 1st Accused in the commission of the offence.

52. The 1st Appellant submitted that the inventory was made and he was forced to sign it. That the police were desperate to pin the recovered goods on him so as to rely on the doctrine of recent possession. He further submitted that if the goods were recovered from him, why wasn't he charged with the offence of handling stolen property? He relied on the case of *Isaac Ng'ang'a Kahiga Alias Peter Ng'ang'a Kahiga v Republic* (2006) eKLR to support his submission.

53. The 1st Appellant submitted that the prosecution's case hinged on circumstantial evidence. That the circumstantial evidence in this case was so weak and far-fetched that it did not provide a nexus between him and the commission of the offence. It was his further submission that the tests set out in the case of *GMI v Republic* (2013) eKLR had not been met.

54. It was the 1st Appellant's submission that the Safaricom data print out and communication link charts were never produced by the maker. That PW7 and PW9 were experts in conducting investigations and not in communication. He relied on Section 48 of the *Evidence Act* and the case of *Onoka Mutonyi and Jackson Kamande v Republic* (1982) eKLR to support his submission.

55. The 1st Appellant further submitted that the trial court did not conduct a sentence rehearing exercise to weigh the circumstances that prevailed at the time of the commission of the offence and any other mitigating circumstances. That the trial court blindly applied the provisions of Section 296 (2) of the *Penal Code* without giving any considerations to mitigating circumstances contrary to the decision

in *Francis Karioko Muruatetu And Another v Republic* (2017) eKLR. He further submitted that the mandatory nature of the sentence provided under Section 296 (2) of the *Penal Code* deprived the court of its judicial discretion given under Article 165 (3) of the *Constitution* of Kenya of Kenya.

56. It was the 1st Accused's submission that the courts have since applied the Muruatetu's principles in Capital offences and that the death sentence has since been reviewed and replaced with determinate sentences. He relied on the cases of *Robert Mutashi Auda v Republic* (ur) And *Martin Bahati Makoha And Another v Republic* (2018) eKLR to support his submission.

The 2Nd Appellant's /2Nd Accused's Defence.

57. The 2nd Accused testified as DW2 and stated that he was arrested on 1st March 2010 while in a hotel within Bomet by 4 people who introduced themselves as police officers. It was his case that he was taken to Bomet Police Station and placed in the cells where he was tortured and his left leg broken. That afterwards, they showed him a photograph and asked him where the person in the picture was. That he told them that the picture had been taken at Kericho Police Station.

58. It was the 2nd Accused's testimony that on 7th March 2010, he was taken to Kericho Police Station where he was forced to sign papers which he found there. That he did not know what the contents of the paper were. The 2nd Appellant produced an X-ray from Kericho District Hospital for 16/02/2010 as D. Exh 2 and a P3 form as D. Exh 3. He further stated that the charges were read to him on 15th March 2010 and was later joined with others in this case which he knew nothing about.

The 2Nd Appellant's/ 2Nd Accused's Submissions On Appeal

59. The 2nd Appellant submitted that the documentary evidence adduced by PW7 did not link the 2nd Appellant with the alleged offence. That PW7 was not an expert with Safaricom Company to enable him produce the printout. It was his submission that the maker of the print outs who is Safaricom Kenya did not show up in court or give a Certificate to prove authenticity of the said print outs. He further submitted that the learned magistrate conducted an irregular trial because he allowed exhibits (MF1-12) to be produced contrary to Sections 35 and 77 of the *Evidence Act*.

60. The 2nd Appellant submitted that his rights were violated as nothing was done to punish the police officers who broke his leg. He further submitted that he produced an x-ray from Kericho District Hospital and a P3 form to show that his leg was broken but nothing was done. It was his submission that justice was not served.

61. It was the 2nd Appellant's submission that the print out produced by PW7 was doubtful as it did not show anywhere that the line xxxx was used in the Nokia 5000. It was his further submission that the print out issued by Safaricom on 23rd March 2010 showed the line xxxx but with a different serial number. He submitted that the evidence adduced by PW7 and PW9 ought to be disregarded.

62. The 2nd Appellant submitted that he was arrested and nothing was recovered from him. That he was arrested because of the many robberies within the area and not because of this particular offence. It was the 2nd Accused's submission that he was truthful and the prosecution failed to investigate and establish the truth. He relied on the case of *Ouma v Republic* (1986) KLR 501 to support his submission.

The 3Rd Appelant's/7Th Accused's Defence

63. The 3rd Appellant stated that he got a threatening message on his phone on 27th May 2010 and he reported the same to Kericho Police Station. That he was then taken to the CID office and asked for

the receipt of the phone which he did not have. He stated that the phone belonged to his wife with whom they had separated.

64. It was the 3rd Appellant's case that his wife had refused to take back her phone because it was damaged. That he paid her Kshs 5000 and she left. It was the 3rd Appellant's further case that they were arrested but his wife was later released.

The 3Rd Appellant's/ 7Th Accused's Submissions On Appeal.

65. The 7th Appellant submitted that the evidence of PW9 exonerated him from the commission of the offence as he was an innocent handler of the Nokia 5000. That there was no evidence that linked him to the other suspects and the evidence tendered did not disclose to whom the Nokia 5000 was sold to and when. It was his submission that the Nokia 5000 was recovered after 7 months and that PW9 had confirmed that the 2nd Accused admitted to having sold the phone therefore there was no way that he would have stolen the phone.

66. The 7th Appellant submitted that the 7 month period between the robbery and the recovery of the phone made the doctrine of recent possession untenable. He relied on the case of *Cash v Republic* (1985) QB 801 to support his submission. It was his submission that the doctrine was wrongly applied and the conviction could not sustain.

67. It was his submission that the data evidence did not link him to the commission of the offence. That the data was produced with no certificate or any expert from Safaricom contrary to Section 106 (b) and 150 of the *Evidence Act*. It was his submission that there was no evidence to convict the 3rd Appellant and that his defence was not adequately considered. He relied on the case of *Peter Njunguna v Republic* 1982 KLR to support his submission.

68. I have gone through and given due consideration to the trial court proceedings, the Amended Grounds of Appeal and the Supplementary Memorandum of Appeal by the 1st, 2nd and 3rd Appellants, the respective Written Submissions, the 1st Appellant's oral submission in court and the Respondent's Written Submissions dated 5th November 2021. Three issues arise for determination as follows:

    (I) Whether the Prosecution proved its case beyond reasonable doubt and in particular the ingredients of the offence and positive identification of the Appellants

    (II) Whether the Defence places doubt on the prosecution case.

    (III) Whether the Sentence preferred against the accused person was manifestly excessive, harsh and severe.

(I) Whether the Prosecution proved its case beyond reasonable doubt and in particular the ingredients of the offence and positive identification of the Appellants.

69. The accused persons were charged and convicted for the offence of Robbery with Violence contrary to Section 296 (2) of the *Penal Code*. Section 295 of the *Penal Code* defines robbery as:

> " Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery".

Section 296 of the *Penal Code* states as follows:

"(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".

70. The Court of Appeal in the case of *Johana Ndungu v Republic* (1996) eKLR, set down the ingredients of robbery with violence by stating thus:-

> "In order to appreciate properly as to what acts constitutes an offence under section 296 (2) one must consider the sub-section in conjunction with s.295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s.296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:
>
> 1. If the offender is armed with any dangerous or offensive weapon or instrument, or
> 2. If he is in company with one or more other person or persons, or
> 3. 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.

71. Further, the Court of Appeal in the case of *Simon Materu Munialu V Republic* (2007) eKLR held that:-

> "The ingredients that the appellant and for that matter any suspect before the court on a charge of robbery with violence in which more than one person takes part or where dangerous or offensive weapons are used or where a victim is wounded or threatened with actual bodily harm or occasioned actual bodily harm is section 296(2) of the Penal Code. It is these ingredients which need to be explained to such accused person so as to enable him know the offence he is facing and prepare his case. These ingredients are not in section 295 which creates the offence of robbery. In short, section 296(2) is not only a punishment section, but it also incorporates the ingredients for that offence which attracts that punishment. It would be wrong to charge an accused person facing such offence with robbery under section 295 as read with section 296(2) of the Penal Code as that would not contain the ingredients that are in section 296(2) of the Penal Code and might create confusion.

72. It is salient to note that the appellants herein were charged with robbery with violence contrary to Section 296(2) of the *Penal Code* which contained the ingredients necessary to sustain the charge. Robbery is defined in the *Black's Law Dictionary*, 10th Edition as:-

> "The illegal taking of property from the person of another, or in the person's presence by violence or intimidation".

73. PW1 testified that on the material day that three people broke into his house and into his bedroom where he slept with his wife and children. It was his testimony that one of the attackers hit him with a rungu on his back and mouth.

74. It was PW1's further testimony that the attackers thereafter took mobile phones i.e. Motorola L6, Nokia 1200, Nokia 5000 and a Laptop HP G50. This was corroborated by PW2. PW1 provided the police with a receipt to indicate that he owned the phone and the same was marked P.Exh 4. It was PW1 and PW2's further testimony that they saw the attackers armed with a knife and a rungu. During cross examination, PW1 and PW3 testified that they heard one of the attackers shout "piga yeye risasi"- which meant shoot him. This meant that they were armed with a gun. This clearly indicated that the attackers gained possession of the mobile phones and the laptop illegally with the use of violence which falls within the definition of robbery.

75. PW2 who was the wife to PW1 testified that on the material day, they were attacked by three robbers. PW1 also testified that they were attacked by three people. She saw the 1st appellant hit PW1 with a rungu. PW3 who was the night guard on the material day testified that before the robbers got into the house, they attacked him with a knife and threatened to kill him. He further testified that they choked him and held him at gun point. The whole testimony of PW3 pointed to the fact that the robbers were more than one and were armed with a knife and a gun.

76. PW8, a clinical officer based at Kericho District Hospital, testified that upon examining PW1 he found that the left chin was tender and swollen with bruises. He further noted that his mucus membrane as bruised from the inside the nose. PW8 filled and produced the P3 form as P.Exh 5.

77. From the evidence above, which I find credible, it is clear that PW1 and PW2 were assaulted and the assailants had armed themselves with a rungu among other crude weapons. Thus, I find it proven that there was theft and there were more than one assailant who were armed. The ingredients contained in Section 296 (2) of the *Penal Code* were therefore satisfied.

78. The final and most critical issue towards proof of the offence is the positive identification of the assailants. The Court of Appeal in the case of *Cleophas Wamunga v Republic*(1989)eKLR expressed itself as follows:-

> " Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant wholly depends or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification".

79. The English case of *R v Turnbull* (1977) QB 224 gives further guidance as follows:-

> " If the quality (of identification evidence) is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however that an adequate warning has been given about the special need for caution".

80. With the above caution in mind, I have re-looked the evidence of identification. PW1 testified that he was able to identify one of them as he was the one who had hit him and stayed with him for a while. He further stated that he saw the 2nd Accused that night. PW1 testified that the room was sufficiently lit from the fluorescent tubes that were outside and that the room had curtains which were transparent. It was PW1's testimony that the assailants were the 1st and 2nd Accused (now 1st and 2nd Appellants).

81. PW2 testified that she was able to identify the 1st Appellant as one of the attackers through security lights that were outside. It was her further testimony that the said lights lit the room well enough to enable her identify the 1st appellant. That the 2nd Appellant took her to the wardrobe to get her wallet. During cross examination, she confirmed that her curtains were indeed light and could illuminate the room well enough. She further stated that the attackers had torches that they used in moving around in their search for valuables.

82. PW3 testified that he saw 4 attackers on the material day but he could not identify any of them.

83. In the case of *Kiarie V Republic* (1984) KLR 739 the Court of Appeal held that:

> " Evidence of identification/recognition at night must be absolutely watertight to justify conviction."
>
> Further, the Court of Appeal in the case of *John Muriithi Nyagah V Republic* [2014] eKLR, held that: -
>
> > "In testing the reliability of the evidence of identification at night, it is essential to make an inquiry of the relevant circumstances such as the nature of the light, the strength of the light, its size, its position relative to the suspects etc."

84. As earlier stated, the evidence of PW1 and PW2 pointed out the fact that the bedroom where they were attacked was illuminated by a security light i.e. a fluorescent tube. Both stated that the attackers had torches that they used to move around the house looking for valuables. It is my finding therefore that based on the above, the light from the fluorescent tubes and torches were sufficient enough for the victims (PW1 and PW2) to see the assailants. Additionally, the proximity and time spent with PW1 and PW2 during the robbery enhanced chances of recognition. The Court of Appeal in the case of *Shadrack Shuatani Omwaka V Republic* [2020] eKLR while discussing identification of an assailant at night cited with approval the decision of the Supreme Court of Uganda in *Abdulla Nabulere And Another – V - Uganda* Cr. Appeal No. 9 of 1978 (UN Reported) where the court held as follows:

> " ....Apart from light during the incident, and familiarity of the assailant to the victim, other factors, such as distance between them, the length of time the victim had to observe and even the opportunity to hear the assailant are factors to look out for."....

85. It is my finding therefore that PW1 and PW2 clearly saw the 1st and 2nd Accused, now 1st and 2nd Appellants and were able to subsequently identify them. With respect to the 2nd Appellant, PW2 subsequently identified him in the dock.

86. An identification parade was conducted by PW5, I.P Reuben Onchoka on 28th December 2009 which resulted in the identification of the 1st Appellant. With regards to identification parades, the Court of Appeal in the case of *Samuel Kilonzo Musau V Republic* (2014) eKLR held that:

> " The purpose of an identification parade, as explained in *Kinyanjui & 2 Others V Republic* (1989) KLR 60, "is to give an opportunity to a witness under controlled and fair conditions

to pick out the people he is able to identify, and for a proper record to be made of that event to remove possible later confusion. It is precisely for that reason that courts have insisted that identification parades must be fair and be seen to be fair. Scrupulous compliance with the rules in the conduct of identification parades is necessary to eliminate any unfairness or risk of erroneous identification. In particular, all precautions have to be taken to ensure that a witness's attention is not directed specifically to the suspect instead of equally to all persons in the parade. Once a witness has properly identified a suspect out of court, the witness is allowed to identify him on the dock on the basis that such dock identification is safe and reliable, it being confirmed by the earlier out of court identification."

87. Additionally, in the case of *Donald Atemia Sipendi V Republic* (2019) eKLR, the Court stated:

> " Identification parade procedures are regulated by Police Force Standing Orders now under the *National Police Service Act* 2011, and previously under the Police Act (repealed). The procedure for identification parades were also laid out in the cases of R V. Mwango s/o Manaa[16] and Ssentale v Uganda.[17] The rules include the following:-
>
> i. The accused has the right to have an advocate or friend present at the parade;
>
> ii. The witness should not be allowed to see the suspect before the parade and the suspects on parade should be strangers to the witness;
>
> iii. Witnesses should be shown the parade separately and should not discuss the parade among themselves;
>
> iv. The number of suspects in the parade should be eight (or 10 in the case of two suspects);
>
> v. All people in the parade should be of similar build, height, age and appearance, as well as of similar occupation, similarly dressed and of the same sex and race;
>
> vi. Witnesses should be told that the culprit may or may not be in the parade and that they should indicate whether they can make an identification; and
>
> vii. As a recommendation, the investigating officer of the case should not be in charge of the parade, as this will heighten suspicion of unfair conduct in the courts.

88. PW5 testified that he conducted an identification parade, where the 1st appellant appeared alongside other suspects. It was his testimony that he informed the 1st appellant that he would conduct an identification parade and he accepted. That the 1st appellant called advocate Korir to be present during the parade. PW5 further testified that he had 9 members in the parade. From the testimony of PW5, PW1 and PW2 identified the 1st appellant who was stationed between the 5th and 6th person. PW1 and PW2 corroborated this fact in their individual testimonies. PW5 produced Identification Parade Forms marked as P.Exh 1 and P.Exh. 6 that indicated that the 1st appellant had been identified by way of touch by PW1 and PW2. The forms also contained the signature of the 1st appellant with his reply to the conduct of the parade recorded as "Nimetosheka"- meaning I am satisfied. The Forms also indicated that there were 8 members in the parade and the 1st appellant had been picked between the 5th and 6th person in the parade.

89. The authenticity of the Identification Parade Form was not challenged by the 1st appellant. The quality of the identification parade was unshaken during cross examination. It is my finding that the identification parade was properly conducted in line with the conditions set out in the case of *Donald Atemia Sipendi V Republic* (*supra*) and the 1st appellant was positively identified by PW1 and PW2.

90. The trial court dismissed the identification parade holding that it was compromised because the photograph of the 1st accused person had been taken from his house. The trial court was of the view that it was sinister and most probably used to influence PW1 and PW2. However, I must disagree with the trial court as there was no evidence which showed the picture was used in the identification parade. PW5 testified that he held the parade in a separate venue from where he kept the suspects and thus PW1 and PW2 could not see them. There was no evidence that PW1 and PW2 had been shown the picture of any of the accused before the parade was conducted. The trial magistrate therefore erred in dismissing the evidence of PW5. It is my finding that the parade was conducted in accordance with the law and that the 1st Appellant was identified in that parade.

91. From the record, it is evident that there was no identification parade conducted on the 2nd appellant and 3rd appellants. I therefore proceed to critically examine other evidence with respect to whether or not they were positively identified and linked to the offence.

92. PW1 and PW2 identified the 2nd appellant at the dock. From the record, it is evident that no physical descriptions were given at the time of reporting. However as I found earlier that the environment for identification was conducive, I have no reason to disregard the testimonies of PW1 and PW2 in regards to identifying the 2nd appellant. The Court of Appeal in the case of *Muiruri & 2 Others V. Republic* [2002] 1 KLR 274, expressed itself as hereunder:

> " We do not think it can be said that all dock identification is worthless. If that were to be the case then decisions like *Abdulla bin Wendo v. Rep* (1953) 20 EACA 166, *Roria v. Republic* [1967] EA 583, and *Charles Maitanyi v. Republic (1986) 2 KAR 76*, among others, which over the years have been accepted as correctly stating the law concerning the testimony of a single witness on identification will have no place in our jurisprudence. In those cases courts have emphasized the need to test with the greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to found a conviction. We do not think that evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification."

93. In this case and as earlier stated, PW2 clearly identified the 2nd Accused as he was the one who had attacked and commandeered her to the wardrobe to get money from her purse. The witness also proved that there was sufficient light from the fluorescent tubes outside the window which had transparent curtains. It is my conclusion therefore that the dock identification of the 2nd Appellant considered against other circumstances of the case was not worthless. It is my firm finding that the 2nd Appellant was positively identified and linked to the robbery.

94. PW1 testified that on the material day, he was robbed off the following items:

    i. Motorola L6 phone (Serial Number xxxx)

    ii. Nokia 1200 phone

    iii. Nokia 5000 phone (Serial Number xxxx)

    iv. HP G50 laptop

95. PW9 testified that they gave the aforementioned serial numbers to Safaricom in an effort to have the mobile phones traced. They discovered that the Motorola L6 used xxxx which was unregistered. The Nokia 5000 used the number xxxx.

96. When the police arrested the 1st appellant in his home, they recovered a blood stained metal bar, a brown leather wallet, pressure detector, 3 photographs, a panga, a slasher, a Nokia phone and 4 sim card plates which had the following serial numbers:

i. xxxx

ii. xxxx

iii. xxxx

iv. xxxx

It was the evidence of PW9 that one of the pictures that they found in the house of the 1st appellant was that of the 2nd appellant. Upon further questioning, the 1st appellant gave the police the number of the 2nd appellant which was 0728156108. The 2nd appellant together with other suspects were later arrested.

97. It was the evidence of PW9 that the sim card plate (P.Exh 8) bearing the serial number xxxx used the number xxxx and it was being used in the Motorola L6. That the 1st appellant told the police that he had sold the phone and further told them that he got the phone from a robbery in Jamji. That the recovery of the said sim card plate linked the 1st appellant to the robbery.

98. According to PW9, he discovered later that the number xxxx (which was used in the Nokia 5000) belonged to the 2nd appellant and that he had used it to communicate with the 1st appellant and other suspects. The number also communicated with xxxx which was unregistered. At this point, the 2nd appellant had sold off the Nokia 5000. It was clear that from the evidence that the 2nd appellant had possession of the Nokia 5000 before he sold it.

99. Upon further investigations and information from Safaricom, the Nokia 5000 was traced and it used the number xxxx registered in the names of the 3rd appellant. The 3rd appellant was later arrested in possession of the Nokia 5000 and PW1 positively identified it. The recovery of the Nokia 5000 was done sometime in May 2010 and that was not long after the robbery which occurred sometime in November 2009.

100. PW1 had produced receipts the two mobile phones and the same were marked as P.Exh 3 and P. Exh 4 which proved ownership.

101. Once the 1st and 3rd appellants were found to be in possession of the stolen mobile phones, they had the evidentiary burden to explain the possession. The 1st appellant stated that the police did a search in his house and took away his photos and other things and that then forced his wife to sign the inventory which was produced and marked as P. Exh 9. In his statement, the 1st appellant confirmed that his number was xxxx and his phone was a Nokia 2600. As earlier stated, the police found this number as unregistered and it was being used in the stolen Motorola L6. The 2nd appellant stated that he was arrested and tortured while in detention, he further stated that the line that was used in the robbery was not his. This could not be the case as the number xxxx that was registered in his name was used in the phone Nokia 5000. These explanations in regards to possession of the Nokia 5000 were unsatisfactory and it is my finding that the appellants failed to discharge their evidentiary burden of proof.

102. The 2nd and 3rd appellants were linked to the robbery through the recovered Nokia 5000. The police were able to track the said mobile phone through the serial number and phone number data that were accessed through Safaricom data. PW9 produced call logs from Safaricom and it was on the basis of those call logs that they were able to form a call chart produced as P.Exh. 14 thereby linking the 2nd and

3rd appellants to the robbery. The said call logs were electronic evidence and the same is governed by the provisions of Section 106 (b) of the *Evidence Act*.

103. 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 conditions 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) by 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".

104. From the above provisions, electronic data material is inadmissible in evidence unless they meet the criteria stipulated in Section 106 B of the *Evidence Act*. It is clear from the evidence that the electronic data produced by PW9 although stamped by Safaricom, was not accompanied by the requisite Certificate. In the case of *Charles Matu Mburu V Republic* (2014)eKLR, the Court of Appeal observed that;

> "In this case, the computer print-outs that were produced by the prosecution of the call history on the deceased's mobile phone do not contain the certification mentioned in the above provision. Further, no evidence was tendered on how the said print-outs were generated. We agree with the appellant's submission that the said print-outs had not been verified by Safaricom, hence they were inadmissible. We find that the two lower courts erred in relying on the said print-outs".

105. I am further persuaded by the case of *Donald Atemia Sipendi V Republic* (2019) eKLR, where Mativo J held:

> "As stated above, the Safaricom data records were produced by a Police Officer. He is not the maker of the document nor does he work for Safaricom. He could not give evidence on how the records were generated, stored or printed or vouch on their accuracy. In short, he was not competent to produce the same. The said evidence was not properly received. The learned Magistrate erred in law by allowing the said records to be produced by a person who was not competent to produce them".

106. It is therefore my finding that the call logs from Safaricom that were used by PW9 to do a link chart were inadmissible by virtue of a want of the requisite Certificate as per Section 106B of the *Evidence Act*.

107. I will now examine the evidence of recent possession. The trial court convicted the appellants on the doctrine of recent possession. In the case of *Kelvin Nyongesa & 2 Others v Republic* (2016) eKLR, the High Court held that:-

> " The doctrine of recent possession entitles the court to draw an inference of guilt where the accused is found in possession of recently stolen property in unexplained circumstances".

108. The Court of Appeal in the case of *Eric Otieno Arum v Republic* (2006) eKLR, where the court stated as follows:-

> " In our view, before a court of law can rely on the doctrine of recent possession as a basis of 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".

109. In the case of *Kelvin Nyongesa* (supra), the court held that:

> " Once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for the possession. This burden is evidential only and does not relieve the prosecution from proving its case to the required standard".
>
> Further, in *Paul Mwita Robi v Republic* (2010) eKLR, the Court of Appeal explained thus:-
>
> "Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is (sic) especially within the knowledge of the accused and pursuant to the provisions of section 111 of the *Evidence Act* Chapter 80, the accused has to discharge that burden".

110. Evidence showed that the 3rd Appellant was in possession of the Nokia 5000. George Murunga (PW9) testified that the 3rd Appellant was arrested on 27th May 2010 while in possession of the Nokia 5000 that had been stolen and the same was not challenged during cross examination. The Court of Appeal in the case of *David Mugo Kimunge V Republic* (2015) eKLR quoted the Canadian Supreme Court case of *Republic V. Kowkyk* (1988)2 SCR 59 where it stated:

> " .....upon proof of the unexplained possession of recently stolen property, the trier of fact may –but not must-- draw an inference of guilt of theft or of offences incidental thereto. Where the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be for the trier of fact upon a consideration of all the circumstances to decide which, if either, inference should be drawn. In all recent possession cases the inference of guilt is permissive, not mandatory, and when an explanation is offered which might reasonably be true, even though the trier of fact is not satisfied of its truth, the doctrine will not apply."

111. The Court of Appeal in the case of David Mugo Kimunge (supra) stated that:

> " The doctrine of recent possession has been applied in numerous decisions of this court and the High court properly cited the *Kahiga case* (supra) as one for the elements necessary for proof. We may reproduce the elements from that case:
>
> > "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:

i). that the property was found with the suspect;

ii). that the property is positively the property of the complainant;

iii). that the property was stolen from the complainant;

iv). 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."

112. In the present case, PW1 and PW2 testified that they had been robbed off mobile phones and a laptop on 23rd November 2009. That one of the mobile phones was a Nokia 5000. PW7 who was attached to the CID office in Kericho testified that the complainant (PW1) reported to their office that he had been attacked by armed robbers and they stole many things which included an L6 Motorola phone, Nokia 1200, Nokia 5000, a laptop and a wallet containing Kshs 300.

113. On the issue of the phone being the positive property of the complainant, PW1 had produced a receipt marked P.Exh 4 indicating where he had bought it and that proved ownership. PW9 testified that the PW1 came to the station after the 3rd appellant had been arrested and he identified the phone. I am satisfied therefore that the mobile phone was positively proven to belong to the complainant.

114. On the issue of time, the robbery occurred on the night of 22nd November 2009 and the 3rd accused person was arrested with the Nokia 5000 on 27th May 2010. The difference was 5 months. It is not uncommon for mobile phones of this nature to pass from one person to another. It is therefore this court's finding that the 3rd accused person failed to explain how he came into possession of the Nokia 5000 and consequently he falls victim to the doctrine of recent possession.

II. Whether the Defence places doubt on the prosecution case.

115. I have already set out the defences of the 3 Appellants earlier in this Judgment. I have considered the defences carefully. They all amount to mere denials and do not cast any doubt on the Prosecution's case which I have found proven to the required legal standard. They would still have been convicted even if they had not tendered any defence at all

III. Whether the Sentence preferred against the accused person was manifestly excessive, harsh and severe.

116. In *Bernard Kimani Gacheru v Republic* (2002) eKLR, the Court of Appeal stated that:-

> " It is now settled law, following several authorities by this court and the high court, that sentence is a matter that rests in the discretion of the trial court. Similarly, the 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 the wrong material, or acted on the 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 states is shown to exist".

117. In this case the Appellants were charged with Robbery with Violence contrary to Section 296 (2) of the *Penal Code*. The provision state:-

> " 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".

118. In mitigation, the 1st and 2nd appellants had nothing to say. The 3rd appellant said that he will let the court decide.

119. The court has discretion in issuing of sentences and the minimum nature of this sentence does not make it illegal. In the Supreme Court case of *Francis Karioko Muruatetu And Another v Republic*, Petition No. 15 & 16 (Consolidated) Of 2015 it was held that:

> " We therefore reiterate that, this Court's decision in Muruatetu did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute".

120. The *Criminal Procedure Bench Book* at page 116 provides that:

> " The sentences imposed should be geared towards achieving the following objectives set out in the sentencing policy guidelines (paragraph 4.1):
>
> i. Retribution.
>
> ii. Deterrence.
>
> iii. Rehabilitation.
>
> iv. Restorative justice.
>
> v. Incapacitating the offender.
>
> vi. Denouncing the offence, on behalf of the community".

121. It is therefore my finding that the trial magistrate did not overlook some material factor, or took into account the wrong material, or acted on the wrong principle.

122. In conclusion, having considered the Appellants Amended Memorandum of Appeal, and also having carefully reviewed the evidence on record, there is nothing that suggests that the learned magistrate erred in convicting the 1st, 2nd and 3rd Appellants. They were clearly linked to the robbery and were guilty as charged.

123. The conviction and sentences are upheld. Their respective Appeals are thus dismissed.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 29TH DAY OF JULY,2022

.....

R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of 1st ,2nd and 7th Appellants, appearing in person, Mr. Muriithi for the Respondent and Kiprotich(Court Assistant)