Wambui & another v Republic (Criminal Appeal E013 & E014 of 2021 (Consolidated)) [2022] KEHC 10552 (KLR) (27 July 2022) (Judgment)

Neutral citation: [2022] KEHC 10552 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL E013 & E014 OF 2021 (CONSOLIDATED)

GWN MACHARIA, J

JULY 27, 2022

BETWEEN

WILSON NGUGI WAMBUI ..... 1ST APPELLANT

HEZRON KIARIE MBUGUA ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Naivasha Cr. Case No. 512 of 2017 delivered by Hon. K. Bidali (SPM) on 23rd September 2019)

JUDGMENT

1. The Appellants, Wilson Ngugi Wambui and Hezron Kiarie Mbugua, were charged alongside two others with two counts of robbery with violence contrary to Section 295 as read with Section 296(2) of the *Penal code*.

2. In count 1, the particulars were that on the night of 7th March, 2017 at around 2000 hours in Naivasha Sub-County within Nakuru County, jointly with others not before court, being armed with dangerous weapons namely metal bars and pangas, robbed off PNN one motor vehicle registration number KCB xxxJ make Toyota Fielder valued at Kshs 800,000/=, one mobile phone, make Alcatel valued at Kshs. 7,000/=, laptop make Lenovo valued at Kshs. 45,000/=, camera make Sony valued at Kshs. 15,000/=, and cash Kshs. 5,000/-, all totaling to Kshs. 872,000/= and immediately before the time of such robbery used physical violence to the said PNN.

3. In count 2, the particulars were that on the night of 7th March, 2017 at around 2000 hours in Naivasha Sub County within Nakuru County jointly with others not before court, being armed with dangerous weapons namely metal bars and pangas robbed off vWK one 13 kg gas cylinder valued at Kshs. 10,000/-, DVD valued at Kshs. 5,000/-, Zulu decoder valued at Kshs. 5,000/=, all totaling to Kshs. 32,000/- and immediately before the time of such robbery used physical violence to the said VWK.

4. They pleaded not guilty to the offences. Upon full trial, they were found guilty of the two counts of robbery with violence and were sentenced to suffer death. Being aggrieved by both their conviction and sentences, they preferred the instant appeals. The appeals were heard together and have now been consolidated for purposes of this judgment.

Grounds of Appeal

5. The 1st Appellant's appeal is based on amended grounds of appeal filed alongside his written submission on 1st October, 2020 and 16th February, 2022. These can be summarized as follows:

    1. That the learned trial magistrate erred in law and facts in failing to find that the charges facing the Appellant were defective.

    2. That the learned trial magistrate erred in law and facts in failing to find that identification parade was not performed as required in law.

    3. That the learned trial magistrate erred in law and facts in failing to consider that there were material contradictions in the evidence of the complainant and his wife which raises serious doubts making it unsafe to convict the Appellant.

    4. That the learned trial magistrate erred in law and facts in failing to find that material exhibits particularly the alleged stolen vehicle were not produced.

    5. That the learned trial magistrate erred in law and fact in dismissing the appellant's defence of alibi without advancing cogent reasons.

    6. That the learned trial magistrate erred in law by awarding a mandatory death sentence without considering the Appellant's mitigation and circumstances that prevailed during the commission of the offence.

6. The 2nd Appellant's appeal is based on amended grounds of appeal filed alongside his written submission on 22nd April, 2022. These are:

    1. That the honourable trial magistrate erred in matters of law and facts by failing to find that the Appellant was not properly identified as the perpetrator of the offence charged.

    2. That the honourable trial magistrate erred in matters of law and fact by failing to find that vital witnesses and important exhibits to prove important facts of the alleged offence were not produced.

    3. That the honourable trial magistrate erred in matters of law and fact by failing to note that Appellant's right to a fair trial under Article 50 (2) (j) of the *Constitution* was violated.

Summary of Evidence

7. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced by the witnesses before the trial court so as to arrive at its own independent verdict whether or not to uphold the decision of the trial court. In doing so, this court is required to take into account the fact that it neither saw nor heard the witnesses and give due regard for that. (See: *Okeno v Republic* (1972) EA 32).

8. At this point, it is important to point out that the 1st Appellant was the 1st accused in the trial court whilst the 2nd Appellant was the 3rd accused. This is because in summarizing the evidence, the other

accused persons who are not before this court shall be referred to as the 2nd and 4th accused person respectively while the Appellants shall be referred to by their current titles.

9. The Prosecution called a total of nine witnesses. Their evidence can be summarized as follows: On 3rd March, 2017 at 8.00 pm, the complainant, PWI PNN, returned home in his motor vehicle KCB xxxJ Toyota Fielder. Suddenly, about ten men armed with a panga and other crude weapons accosted him. The security lights in his compound were on. When he tried to raise alarm, one of the men struck and cut him on the head. Meanwhile, his wife, PW2 VW, was in the house preparing dinner when she heard a commotion and went to open the main door. The 1st Appellant entered the house followed by her husband PW1 who was bleeding and was being escorted by the 2nd accused person. PW1 clearly saw the faces of the 1st Appellant and the 2nd accused since the lights in the house were on. She screamed and ran to the bedroom then returned.

10. The 1st Appellant hit PW2 with the flat side of the panga and demanded for money. PW2 told him that the money was in the bedroom and he led her there. PW2 gave the 1st Appellant Kshs. 5,000/= and the 1st Appellant tore off her trouser and panty with his panga then took her back to the sitting room. The electric bulbs in the house were on throughout and this enabled PW2 to see the robbers. The robbers ordered PW1 and PW2 to lie down on their stomachs and tied up their hands. Their two children were also forced to lie down. A short while later, four other men joined the robbers and begun ransacking the house then broke the light bulbs in the sitting room which had been on for about five minutes. PW1 and PW2 were then escorted to their vehicle. The robbers stole a gas cylinder, laptop, DSTV box and DVD which they loaded into the car. PW1 sat next to the 2nd accused person while PW2 sat next to the 1st Appellant who sexually harassed her by touching her private parts.

11. After driving for a short while, they were joined by another man. PW1's neighbor, PW5, PNK was returning home at the time when he saw the man boarding PW1's vehicle. PW5 recognized the man as Kamau, the 4th accused, since he was well known to him having been his regular taxi customer. Although it was around 8.30pm, there was moon light and thus PW5 easily recognized the 4th accused as he was in close proximity.

12. The vehicle was driven towards Narok Road and upon reaching Hotsprings Girl's Secondary school, the vehicle turned into a thicket. Shortly thereafter the vehicle ran out of fuel. The robbers made some calls and fuel was brought by a boda boda man. While in the bush, the robbers threatened to rape PW2 but she told them that she was menstruating. The 1st Appellant inserted his finger in her vagina to confirm whether it was true and once he confirmed that it was true, he threatened to sodomize her. They harassed the couple for close to two hours and even exchanged guard duties as two other men joined them and others left. They demanded to know whether the car had a car track and PW1 told them that it did not. The robbers then left the couple in the bush while still tied up. PW2 managed to untie herself and then untied PW1. Since PW2 did not have any lower garment on all that while, PW1 removed his trousers and gave her to wear. The couple then started walking towards the main road where PW1 was given a leso to cover himself up.

13. Meanwhile, at about 9.00 pm while on patrol duties in Longonot area with his colleague, the investigating officer, PW7, CPL Boniface Musau previously of Naivasha DCI office, received a call regarding the robbery. They immediately drove towards Governor Area and located motor vehicle KCD xxxJ as it was being driven towards Naivasha from Maai Mahiu. They turned and pursued the vehicle then caught up with it at Maili Mbili area at Karagita junction. It was packed by the road side. As they were alighting, the vehicle sped off. The officers continued pursuing it and caught up with it at Kihoto Stadium. There were five men at the scene and there was also a motor cycle next to the car. The officers challenged the men to stop but the men ran away and managed to escape into the dark

leaving behind the vehicle and the motor cycle registration KMDS xxxP. They recovered a gas cylinder, DVD and a ZUKU decoder in the vehicle. The officers towed the vehicle and motor cycle towards Maai Mahiu to see if they could trace the victim. They found PW1 and PW2 on the road towards Narok and advised PW1 to seek treatment at Maai Mahiu Health Centre.

14. The following day on 8th March, 2017, PW1 went to the Naivasha Police Station where he managed to identify the motor vehicle as well as several other stolen items which had been recovered from the car. PW9, PC Peterson Njue, took photos of the recovered items and the vehicle and prepared a certificate in that regard. Thereafter, PW7 pursued the owner of the motor cycle PW3, SWK. PW3 told PW7 that she left the motor cycle under the control of the 2nd Appellant herein to do boda boda business with it and her brother K would collect the money. On 10th April, 2017, PW3 led PW7 to the 2nd Appellant's home in Kabati where he was arrested. The 2nd Appellant informed PW7 that he had been called to Kihoto by the 1st Appellant and the 2nd accused to collect and transport a gas cylinder.

15. On 20th April, 2017 at around 9:00 am, PW6, CPL James Kimwerich from DCI Naivasha was instructed to accompany other DCI officers to arrest known robbers. They went together with one PC Kimathi and other police officers in their official vehicle to Limuru town. When they got there, they proceeded to the house of the 2nd accused with the help of informers. They found him with the 1st Appellant and arrested them at about midday. They conducted a search in his house but did not recover anything. He then handed over the two suspects to the investigator.

16. On 21st April, 2017, PW7 requested PW8, CIP Alvin Matara to conduct an identification parade. PW8 had conducted an identification parade in regard to the 2nd Appellant earlier on. The earlier parade had 8 members and the 2nd Appellant chose to stand between position 4 and 5 but PW1 was not able to identify him. As regards the parades conducted on 21st April, 2017, PW8 explained to the 1st Appellant herein and the 2nd accused their rights and they both agreed to participate and signed the parade forms. PW8 conducted two separate parades for each of the suspects. In the first parade, the 1st Appellant chose to stand between parade member 2 and 3 and between position 1 and 2 in the second. In both instances he was positively identified by both PW1 and PW2.

17. On 27th April 2017, PW5 led PW7 to where the 4th accused was and the said accused was arrested and escorted to Naivasha Police Station. On 31st August 2017, PW1 was examined at Naivasha Referral Hospital for purposes of filling the P3 Form. He had deep a cut wound on the right leg and tender and swollen cut wound on his head. The degree of injury was assessed as harm.

18. When placed on his defence, the 1st Appellant elected to give an unsworn testimony in which he denied committing the offence. He stated that on 20th April 2017, he went to visit his neighbor the 2nd Accused to pay for shares. While there, three police officers came at around 12.17pm, searched their respective houses then arrested them and took them to Naivasha Police Station. The following day, he was subjected to an identification parade and then charged for the subject offences.

19. The 2nd Appellant also gave an unsworn testimony. He stated that on 7th March 2017, he was conducting his usual boda boda business. As he was going home, a customer called him and requested him to return to town then to Kihoto area. At Kihoto, the customer instructed him to stop next to a parked vehicle. As he was waiting to be paid, another vehicle approached. He heard a gunshot from the other car and ran away out of shock leaving behind the motor cycle. He never followed up on the motor cycle but he called Kamau and told him about the incident. He was later arrested and charged with the present offences.

Analysis and Determination

20. I have accordingly considered the evidence adduced before the trial court as well as the respective submissions. I have demarcated the following issues for determination:

    i. Whether the charge of robbery with violence was defective for being duplex.

    ii. Whether the 2nd Appellant's right to a fair trial was infringed.

    iii. Whether the prosecution proved its case beyond a reasonable doubt.

    iv. Whether the sentences were proper.

i. Whether the charge of robbery with violence was defective for being duplex.

21. The 1st Appellant contended that he was charged, tried and convicted on the basis of a duplex charge. This was in view of the fact that the charge of robbery with violence was brought under Section 295 as read with Section 296(2) of the *Penal Code*. He submitted that he was seriously prejudiced by the duplicity as it was not clear what offence he was facing or defending given that the two provisions allude to two different offences carrying different punishments. In his view therefore, the charge sheet was fatally defective and this court should acquit him on that basis.

22. According to the Respondent however, although it was preferable to charge the accused persons with robbery with violence under Section 296(2), the defect is not necessarily fatal as the 1st Appellant was not prejudiced by the duplicity. In support, the Respondent cited the case of *Paul Katana Njuguna v Republic* [2016] eKLR where the Court of Appeal pronounced itself on a similar issue.

23. Section 295 of the *Penal Code* provides as follows:

> " 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".

24. Section 296 of the *Penal Code* on the other hand provides 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 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".

25. Section 295 of the *Penal Code* creates the offence of robbery which is different from the aggravated offence of robbery with violence created under Section 296(2) of the *Penal Code*. The punishment prescribed for both offences are also different with the latter carrying a more severe sentence. Charging an accused person under both provisions is therefore duplicitous. (See: *Joseph Njuguna Mwaura & 2 Others v Republic* [2013] eKLR).

26. However, that alone cannot render a trial nullity. The question that this court must then determine is whether the duplicity occasioned a miscarriage of justice and/or was incurable under Section 382

of the *Criminal Procedure Code*. In *Paul Katana Njuguna v Republic* [*supra*], the Court of Appeal held as follows:

> " Having considered the law on duplicity as it has evolved, can we say that the charge as framed in the appeal before us was so defective as to have occasioned a failure of justice? Can it be said with any certainty that the said defect is incurable under Section 382 of the *Criminal Procedure Code*. We observe that the offence under Section 295 and 296 (2) were not framed in the alternative...
>
> 40. In the matter before us, we are unable to detect any prejudice which the appellant suffered. The record shows that the appellant suffered no confusion when the charge, as framed, was read to him and when the witnesses testified, he fully cross-examined them. He raised no complaint before both the trial court and before the High Court. So, while it would be undesirable to charge an accused person under both sections in the alternative, it would not be prejudicial to that accused person if the offences are not framed in the alternative. As we have already noted the rule against duplicity is to enable an accused know the case has to meet. We accept as the correct position in law that uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed. If there is no risk of confusion in the mind of the accused as to the charge framed and evidence presented, a charge which may be duplex will not be found to be fatally defective.
>
> 41. In this appeal, the appellant was fully aware of the case he was to meet when he was charged before the trial court and the charge as framed did not lead to a failure of justice. We must, therefore, reject the appellant's belated complaint that the alleged duplicity in count one of the charge caused him prejudice. We find that the defect if any, was in any event, curable under Section 382 of the *Criminal Procedure Code*."

27. Similarly, in the instant appeal, the trial court's record shows that the 1st Appellant was well aware of the charge he was facing and fully participated in the proceedings by cross examining the prosecution witnesses and tendering his own defence. It is therefore clear that he was not prejudiced by the defect which is not fatal in any event as it can be cured under Section 382 of the *Criminal Procedure Code*.

ii. Whether the 2nd Appellant's right to a fair trial was infringed

28. The 2nd Appellant submitted that he was never supplied with witness statements and therefore never had the opportunity to prepare for the case and/or his defence. He noted that this was the reason why he did not cross examine most of the prosecution witnesses which rendered the trial a nullity. However, he urged the court not to order a retrial in the circumstances but to acquit him because a retrial will give the prosecution an opportunity to fill in gaps.

29. The right to a fair trial is one of the non-derogable rights under Article 25(c) of the *Constitution*. The right to be furnished with witness statements is provided for under Article 50 (2) (c) and (j) of the *Constitution* which stipulate that:

> " Every accused person has the right to a fair trial, which includes the right-
>
> (c) to have adequate time and facilities to prepare a defence.

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence."

30. I have carefully examined the trial court proceedings and I note that the 2nd Appellant did not request to be furnished with witness statements at any point during trial. What is evident is that the 2nd Appellant only briefly cross examined PW7 and PW9 out of the nine prosecution witness. At the end of examination in chief of the other seven witnesses, the learned magistrate only recorded "NIL" on cross examination by the 2nd Appellant but did not interrogate why the 2nd Appellant elected not to cross examine the witnesses. In my considered view, and after a scrutiny of the evidence, it appears that the 2nd Appellant did not cross examine the other witnesses because their evidence did not implicate him with the subject offences in any way. For that reason, I find that his rights under Article 50 (2) (c) and (j) of the *Constitution* were not infringed.

ii. Whether the prosecution proved its case beyond a reasonable doubt.

31. In order to determine this issue, this court is first enjoined to consider whether the evidence on record establishes the offence of robbery with violence. The offence is established where the prosecution proves that there was theft of property under any of the aggravating circumstances enumerated under Section 296 (2) of the *Penal Code*. These are:

    a. The offender is armed with a dangerous or offensive weapon or instrument; or

    b. The offender is in the company of one or more person or persons; or

    c. If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any personal violence to any person.

32. PW1 and PW2 gave consistent and corroborated testimonies of how a gang of about ten men raided their home on the night of 7th March, 2017. The men were armed with dangerous weapons such as a panga which was used to wound PW1's head when he attempted to raise alarm. The panga was also used to slap PW2 and to tear off her lower garments. The robbers used further personal violence on PW1 and PW2 by tying up their hands. They then stole various things from the home including motor vehicle registration number KCB xxxJ make Toyota Fielder, mobile phones, laptop, cash, a 13 kg gas cylinder, DVD and decoder. In view of the same, it is clear that the evidence on record sufficiently established the offence of robbery with violence.

33. The next issue is whether the Appellants were positively identified as part of the perpetrators of the robbery with violence. On this, the 1st Appellant submitted that there is a serious contradiction between the evidence of PW1 and PW2 as regards his identification. He argued that PW1 testified that it was the 1st Appellant who took PW2 to the bedroom whereas PW2 stated that it was the 2nd accused who led her to the bedroom. Further, the 1st Appellant contended that the identification parade was not properly conducted because he was paraded with people who did not have scars on their faces like him and/or clothing similar to him. He further faulted the prosecution for failing to produce the identification parade form in respect of the first parade in which PW1 did not identify anybody. He argued that the said form would have enabled him determine whether the second parade consisted of the same participants thereby exposing him as the only odd or new participant.

34. On his part, the 2nd Appellant submitted that he was not identified as the perpetrator of the offence. He contended that none of the witnesses testified to having seen him at the scene of crime and neither was he arrested at the scene of crime.

35. On the other hand, the Respondent submitted that the 1st Appellant was positively identified by PW1 and PW2 in an identification parade. The Respondent stated that the said witnesses gave a clear account of how the robbery occurred including descriptions regarding light, distance, duration and how they were able to identify their attackers. Further, it was the Respondent's submission that the 2nd Appellant was connected to the offence through his motor cycle which he admitted to have been riding on the material night and to having ran away when he allegedly heard gunshots.

36. The positive identification of an accused person is a very important element of any offence. Where an offence is committed under difficult circumstances, there are a myriad of factors which the court should consider in ascertaining whether the prevailing circumstances were favorable for proper identification. In the instant case, it is not in dispute that the robbery took place at night. However, the evidence of both PW1 and PW2 placed the 1st Appellant at the centre of the robbery.

37. Both PW1 and PW2 stated that they were able to clearly see the 1st Appellant's face when he and the 2nd Accused led PW1 into the house because the lights were on. PW1 stated that the light was bright as there was a high voltage bulb in the house. On her part, PW2 stated that the lights in the house were on throughout the ordeal and that the robbers only hit and broke the sitting room light bulb after it had been on for about five minutes.

38. The two witnesses also gave corroborated evidence that the 1st Appellant sat next to PW2 in the motor vehicle as they were being driven to the bush. Both PW1 and PW2 were also categorical that they spent almost two hours with the robbers in the bush which means that they took a considerable amount of time observing the 1st Appellant. In the circumstances, I am satisfied that the prevailing circumstances obtaining during and after the robbery were conducive for positive identification of the 1st Appellant by PW1 and PW2 in the identification parade.

39. The 1st Appellant contended that the identification parade was irregularly conducted as there was no prior description of the suspects by PW1 or PW2. The position of the law is that the same cannot invalidate a properly conducted identification parade particularly where witnesses informed the police that they could identify the perpetrators if they saw them as PW1 and PW2 did. In the case of *Nathan Kamau Mugwe v Republic* [2009] eKLR, the Court of Appeal made the following observation regarding such a scenario:

> "As to the complaint in ground six that the witnesses had not given to the police the description of the appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. ... It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him. In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade. We reject the contention that because James had not given to the

police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected."

40. Further, I hold the considered view that the identification parade cannot be invalidated by the mere fact that the 1st Appellant was paraded with people who did not have scars on their faces and/or clothing similar to him. The 1st Appellant did not tell the court what was so unique about his dressing and scar that made him an easy pick. Further and in any event, the evidence on record shows that all the parade members wore civilian clothing and the 1st Appellant's scar was barely visible, a fact which PW2 confirmed during reexamination and the trial court acknowledged in its judgment.

41. In addition, the complaint that the prosecution failed to produce the identification parade form in respect of the first parade is unfounded. The parade form was duly produced in evidence as prosecution exhibit 13. I have examined both identification parade forms and confirmed that the members of the first parade were different from the ones in the 1st Appellant's parade and thus there was no possibility of him being singled out as the new face or participant.

42. Further, the 1st Appellant submitted that his alibi defence was not considered by the trial court and claimed that he was arrested out of mere suspicion. According to the Respondent however, all the defences raised by the accused persons were properly considered by the trial and in any case, they were mere denials which did not challenge the prosecution evidence against them. From the record, it is clear that the 1st Appellant did not raise an alibi defence. He simply denied committing the offence and stated that he could not recall where he was on 7th March, 2017. In the trial court's judgment, the learned magistrate duly considered the defences put up by each of the accused persons and found that the same did not in any way exculpate them from the charges.

43. For the above reasons, I find that the 1st Appellant was positively identified as one of the perpetrators of the subject offence. His conviction was therefore safe.

44. As regards the identification of the 2nd Appellant, I note that he was connected to the crimes by virtue of the fact that he left the motor cycle he was riding at the scene where the other robbers abandoned the stolen motor vehicle when the police attempted to arrest them. In my considered view, I do not think that the prosecution proved that 2nd Appellant was an accomplice to the robbers. Foremost, none of prosecution witnesses identified him as having been at the scene of crime or as the rider who took fuel to the other robbers in the bush when the motor vehicle ran out of fuel.

45. Secondly, PW7 narrated how he and his colleague gave chase to and/or pursued the stolen motor vehicle when they spotted it at Governor Area to Maili Mbili in Karagita and then to Kihoto Stadium. PW7 did not mention whether the stolen motor vehicle sped off with the 2nd Appellant's motor cycle in hot pursuit so as to conclude that they had been on the robbery together.

46. Thirdly and in any event, there is very little possibility that the 2nd Appellant would choose to follow the stolen motor vehicle if he was aware that they were being pursued instead of fleeing to a different direction. I am inclined to believe the 2nd Appellant's testimony that he did not take part in the robbery but was merely called to ferry a gas cylinder which happened to be part of the stolen property but did not even get to do so. I will not speculate on why the 2nd Appellant failed to follow up on the motor cycle but am not convinced that the evidence on record places him at the scene of crime. In the premises, I find that the 2nd Appellant was not positively identified as having committed the offences in question. His conviction was therefore not safe.

47. The 2nd Appellant was also aggrieved by the prosecution's failure to call the following witnesses to testify: PW3's brother Hezron Kamau ; PW1 and PW2's two children who were in their house at the

time of the alleged robbery; the neighbours who allegedly called the police; and the good Samaritans who rescued PW1 and PW2. I have perused the evidence on record and am unable to see the benefit that the evidence of the aforesaid witnesses would have added, if any. I say so having in mind that the prosecution is not obliged to call a superfluity of witnesses in order to prove a fact but only such number of witnesses as would sufficiently establish their case. (See: Section 143 of the *Evidence Act* (Cap 80) Laws of Kenya and *Bukenya & others V Uganda* (1972) EA 549).

48. The 2nd Appellant further took issue with the fact that the panga allegedly used to slap PW2 was not produced in court. From the record, it is not clear whether or not the said weapon was recovered from the robbers. Be that as it may, that was not fatal since it is not a mandatory requirement of the law that the weapon used to commit a crime has to be produced in order to prove the offence of robbery with violence. See: *Phenias Njeru Koru v Republic* [2015] eKLR.

iv. Whether the sentences were proper

49. The 1st Appellant challenged the sentence imposed on the ground that the trial court failed to consider his mitigation and the circumstances that prevailed during the commission of the offence contrary to the Supreme Court decision in *Francis Karioko Muruatetu & Anor v Republic* [2017] eKLR. He urged the court to review the death sentence imposed by the trial court.

50. The learned State Counsel for the Respondent opposed any review of sentence. She submitted that the crimes were aggravated in nature as the accused persons terrorized their victims without any mercy in the course of and after robbing them. She contended that they showed no remorse whatsoever during mitigation. Further, she noted that the trial magistrate considered the mitigation before sentencing and therefore did not hand the death sentence because it was mandatory but because of the circumstance of the case and the fact that the offence was prevalent and deterrent sentence was necessary.

51. The record shows that the trial magistrate took into account the facts and circumstances of the offences when exercising his discretion to impose a death sentence. Since that is a lawful sentence for the offence of robbery with violence, I have no reason to interfere with the learned magistrate's discretion in as far as the sentence of the 1st Appellant is concerned.

Conclusion

52. The upshot is that the 1st Appellant's appeal lacks merit and is hereby dismissed. On the other hand, I find that the 2nd Appellant's appeal is merited. The 2nd Appellant's conviction is hereby quashed and his sentence set aside. The 2nd Appellant shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AND DELIVERED AT NAIVASHA THIS 27TH JULY, 2022

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Appellant in person.

2. Miss Maingi for the Respondent.