



REPUBLIC OF KENYA



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**John v Republic (Criminal Appeal E026 of 2022)
[2022] KEHC 15740 (KLR) (22 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15740 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E026 OF 2022
MW MUIGAI, J
NOVEMBER 22, 2022**

BETWEEN

CHARLES KITONGA JOHN APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the original conviction ONLY in the decision by Hon. G. O. Shikwe (SRM) at Kithimani in Criminal case No. 904 of 2015 delivered on the 20th day of March, 2018)

JUDGMENT

Background

1. The Appellant herein Charles Kitonga John jointly with another was charged with three counts of the offence of Robbery with violence contrary to Section 295 as read with Section 296 (2) of the [Penal Code](#).
2. In Count I, the particulars of the offence are that the accused persons, on 19th day of July 2015 at around 0300 hours at Matuu township in Yatta Sub County within Machakos County jointly with others not before the court robbed Mrs Joyce Wambua of a television set make Bruhm valued at Kshs 15,000, a mobile phone make Samsung valued at Kshs 6,000 and a pair of shoes valued at Kshs 2,300 all valued at Kshs 23,300 and immediately before the time of such robbery threatened to assault her.
3. In Count II, the particulars are that on 19th day of July 2015 at around 0300 hours at Matuu township in Yatta Sub County within Machakos county jointly with others not before the court robbed Mr Urbanus Kioko of a DVD player make Aucma valued at Kshs 3,500, a mobile phone make Tecno valued at Kshs 7,000 and cash Kshs 4500 all valued at Kshs 15,000 and immediately before the time of such robbery assaulted the said Urbanus Kioko.



4. In Count III, the particulars are that on 19th day of July 2015 at around 0300 hours at Matuu Township in Yatta Sub County within Machakos county jointly with others not before the court robbed Ms Pauline Mumbua Mulei of a mobile phone make Samsung valued at Kshs 9,000 and immediately before the time of such robbery assaulted the said Pauline Mumbua Mulei.
5. The Appellant pleaded not guilty and the case proceeded to full hearing before the Trial Court whereby prosecution called twelve (12) witness of its case while the accused persons chose to give unsworn testimonies and did not call any witness.

Trial Court Proceedings

6. The case as presented by the prosecution on 19th of July 2015 at around 3.00 pm, Joyce Katinda Wambua, PW1, while asleep in her house heard the sound of someone cutting metal grills outside, woke her husband up and went to the main door to find out what was going on. They were joined by her brother in law. She stated that she heard something like a gunshot. She then locked herself in the bathroom of her bedroom and was later joined by her husband who is a police officer. She asked her husband to get his gun but he told her he did not have it with him that day.
7. She deposed that she heard some commotion in the sitting room but after sometime it stopped and on coming out of the bedroom found the TV set, Samsung phone, two remote control DVD belonging to her brother in law were stolen. Her son's safari boots, jacket, handbag and phone were also stolen. She said that the robbers gained entry through the window grills which they cut and produced a catapult that was marked as MFI-1. The brother in law was injured and that the watchman at a nearby premises called the police. At 9am the next day, the police called her and told her a TV Braum, jacket, 2 remote control DVD had been recovered. She did not identify anyone the night of the robbery. The television set was MFI-2, receipt for the television set MFI-3, DVD Aucma MF1-4, Sony DVD remote MF-5 and television set remote MFI-6, jacket MF1-7. She did not identify anyone on the night of robbery but was told the items recovered were in the possession of Accused 1 and Accused 2.
8. On cross – examination by the Charles Kitonga John (Accused 2) she stated that she did not report the incident to the police but was called the next day about some recovered things. She stated that there were witnesses including the watchman at the church. She also said she saw an injury on her brother in law's head that was plastered.
9. In re-examination, she told the Court that her husband was called from the police station and they all went and recorded statements.
10. David Wambua Force Number xxxx was PW2, he told the court that on July 19, 2015 at 3.00am he was woken up by his brother Albanus Kioko saying he had heard some people outside. He opened the door to see who was outside and saw three people who got inside his house with crude weapons. The 1st accused person who wore a jacket had a torch and sling which he had put on his shoulder and it looked like a gun. He ran back to the house and they locked themselves in.
11. It was his testimony that there were security lights and he saw the 2nd accused person very well breaking the locked door, he had an iron bar. The third person was not in Court. They heard an explosion which they thought was a gun and he and his brother ran into their respective rooms and he locked the steel door. He then called the police who came. He then went to see his brother when they had left and found him injured on the forehead and shoulder and he told him Kshs 4,500 had been stolen from him. He said they also stole a television set, remote control and mobile phones that had been left to charge.
12. It was his testimony that he found a stick that had been wrapped with a rubber band and when the police came, they took the stick and started searching for the robbers. He said the police called him at



- 6.00am informing him that two people had been arrested at a roadblock between Thika and NYS with a television set and other things and he went to the police station where he identified the items. He identified MFI-7. He took his brother to hospital for treatment. They recorded their statements in the morning and in the afternoon an identification parade was conducted and he identified the Appellant as he was brown and the tallest of the people who came to the house. He identified the 2nd accused person whom he said was the shortest of the three. He told the court that he did not lose anything and neither was he injured. He identified MFI-8 and MFI-9 which was the identification parade report.
13. In cross examination, he stated that when he went outside with his brother to find out who was outside, he saw the Appellant and retreated back facing him. He told the police that he could identify the robbers and how they were dressed. He identified his property in the office of the CID where they were. It was his testimony that the people paraded looked almost similar in height, stature and looks, that the Appellant had no injuries. He said he wrote two statements, one at the time of reporting and the other after the identification parade.
 14. When cross examined by the 2nd accused person, he stated that he called the police and informed them that robbers had attacked and had come in through the door. That he narrated what had happened and tried to explain what the robbers looked like, what they had worn and the stolen items. For example, he said that the 2nd accused person had a beard which was longer and bushier than others. He said he did not slap him, they had crude weapons and he observed him for 2-3 minutes as he entered and thereafter ran and locked himself inside his bedroom. That the appellant shone his torch on him and the security lights were also on.
 15. Upon re-examination, he said that when he opened the door, they entered through the door but had earlier attempted to gain entry through the kitchen window.
 16. Albanus Kioko Mbaluka - PW3, stated that on July 19, 2015 at 3.00pm while sleeping in the house with his wife when he heard the door knocked. in the house were his brother and two (2) sisters in law. The sister in law who was sleeping in the sitting room told him there were people outside. He then switched on the lights in his bedroom, sitting room and kitchen then went to wake his brother up and they went to see who was outside when they heard a voice say, "kuja hapa mzee."
 17. PW2 told him that they should retreat. he saw two people get in and one of them had a torch, the third person was still outside. They ran and closed the second door from the sitting room and held onto it and that is when they heard an explosion and they ran as they didn't know how many bullets they had.
 18. Two of the robbers got into his room; one who was tall and dark and had a panga and another who was young and had a beard and held a crowbar, the one with a panga asked for his phone which he gave while the second accused person asked for money and he gave him Kshs 4500. One of the robbers was not in court. The 2nd accused person asked for more money and commanded him to lie down then hit his right shoulder. A third person who was brown and had wrinkles held something like a gun stood at the door. The lights were on and the robbers had not covered their faces.
 19. It was his testimony that they stayed for 20-30 minutes and later he learnt they had made away with his Auema DVD player, his brownish (grey-purple) jacket. They went to his brother's room but found it locked. He recorded his statement in the morning, an identification parade was conducted at Matuu Police Station in the Afternoon and he went to hospital for treatment. He identified MFI-10, the P3 form and MFI-1 to MFI-7 at the police station.
 20. In cross examination he said his brother opened the door and he saw two people enter, that the police came and interrogated them and he thinks it is his brother who called them. They went to identify



- the recovered items at the police station. He testified that he identified the Appellant because he was brown and had a lot of wrinkles as he had seen him standing by his bedroom door.
21. Upon cross examination by the 2nd Accused person, he said he did not describe the robbers to the police who first came to his house. He identified him because he had a beard and he had no injury. That he saw him well and he had a crowbar. He also said his recorded statement did not include the description of the robbers.
 22. When re-examined he said he told the police who he saw while at the police station.
 23. PW4 was Pauline Mumbua, who told the court that while sleeping in the sitting room, she heard a knock at 3.00am at the door from outside. She heard someone cutting the kitchen window. She then ran to the inner rooms. She was in the house with her sister and the husband Albanus and his brother in law and the wife. She found PW3 at the door and she told him what was happening. PW3 switched on the lights and went to wake up PW2. Her sister started screaming. She then heard people in the corridor as if struggling to push the door then shortly an explosion. It was her testimony that PW3 ran into his room followed by three men, one had a panga, the other an iron bar and the other had slung something on his shoulder like a gun. The one with a panga demanded for PW3's phone while the 2nd accused person who was young and had a stylish beard demanded for money and demanded for more money upon being given some money. He then went behind PW3 and hit his shoulder with an iron bar. She was seated on the bed while holding her phone which she gave the 2nd accused person and told them it was her sister's. The other man who was brown and his face had wrinkles stood by the door and kept checking inside the room and the other side. She told the court that they were told to sleep and when they had left, they went to the sitting room and discovered the Television set, remote control, Albanus jacket and safari boots were stolen. She then saw the police after a while who went round the house and found a catapult. She identified the items at the police station and in the afternoon at the identification parade, identified accused 1 because his face was wrinkled and he appeared older than the others and accused 2 who had an iron bar at the time.
 24. On cross- examination by the Appellant, she said when she heard people at the door, she ran to PW3's room whom she found awake and she remained in that room. PW3 went to call PW2 and after sometime came back to the room with three men. She had told the police the description of the people and at the identification parade identified the Appellant well. She also identified the recovered items. She also said she went to the police station the next day, that one of the three persons she saw was not before the court. That she did not see the police write anything at the time she was giving the description to the police. Upon further cross examination he stated that she went to the police station with people but alone during the identification parade.
 25. PW 5 was Benjamin Maingi a Clinical Officer based at Matuu District Hospital. He attended to Mr Albanus Kioko Mbaluka (PW 3) whom he saw had sustained injuries on the right shoulder and a cut of the face. He stated that Albanus told him that the assailant had used an iron bar during the incident. He produced the P 3 form for Albanus as P exhibit 10.
 26. Corporal David Muturi, Force Number xxxx who works at CID Headquarters was PW6. He examined exhibit A brought to him by PC Metto from Yatta which was a small stick and contained remnant of ash and found out that it was an improvised gadget when stick using a nail makes the sound of a gunshot, a low explosive when friction is applied and cannot cause fatal injuries unless applied where there are flammables. He submitted his report of November 12, 2015 and produced it in court as exhibit 11 and 12. There was no cross examination.
 27. PW7 was Constable Stanley Korir from CID Yatta who was on patrol on 19th of July 2015 at 3.00am with Police Constable Metto and Police Constable Mohammed at Matuu Township when



- they received a call from DCIO Sergeant Mwachia that they had received a complaint about a house invasion. They went to the location and found the complainant in the company of others who explained what had happened and the items that were stolen as a Television, 1 DVD, remote controls for DVD and Tv and three mobile phones. One of them was wounded.
28. He stated that when they went round the house they noted that the window leading to the kitchen was broken. They went to the police station with the complainant who recorded a statement. He told the court that the telephone numbers were given to the intelligence officers who tracked the phones to Sofia market. They then informed the police at the roadblocks and at 5.00am the police at Kithimani roadblock said they had apprehended two suspects aboard Silker shuttle in possession of things matching the description given. They proceeded to the road block where they found with 1 Television set, 1 DVD, 2 remote controls and 2 mobile phones ITEI and Samsung, jacket and bag. The bag was marked as MFI-13 and a yellow paper bag MFI-14. He searched the accused persons again and found the Appellant with two receipts dated July 18, 2015 and July 19, 2015 for Nairobi to Matuu and the other for Matuu to Nairobi. The same were marked at MFI-15 and MFI-16 respectively.
 29. Upon cross examination, he stated that they went to the scene and they questioned the complainant and no report was taken at the scene. He said that after the complaints wrote statements a report was minuted on the OB. That the thugs got in through the door. He found the two accused persons outside detained by police after they stopped the motor vehicle, Silker in possession of the stolen items. The tickets had no names but were found in the accused person's possession. Further, that he found the accused persons seated on the ground after police searched the motor vehicle. He told the court that he did not find the 2nd accused person with money but a ticket showing he was travelling from Matuu to Nairobi.
 30. Upon re- examination he said that he recovered the tickets in their shirt pockets but did not recover any money.
 31. PW1 Joyce Katinda Wambua was recalled upon the request of the Appellant, she testified to the effect that she did not see any of the robbers hence could not identify them at the station. She just wrote her statement and went home.
 32. PW8, a conductor of Silker Agencies, Daniel Mutuku in KCC 363M Matatu told the court that at 3 a.m on a date he could not recall while enroute from Ekalakala, two gentlemen at Sofia boarded the matatu with a yellow paper bag and shortly after stopped at the NYS roadblock by the police where he was interrogated and confirmed that he had carried two people from Matuu. He pointed to them the two men who were removed from the vehicle. Tv flat screen remote, torch, DVD and black shoes were found. He identified MFI-16 and MFI-17 as the tickets that were used.
 33. In cross examination, he said that a passenger is issued with a ticket when he enters the vehicle which has a date indicated on it. Fare is Kshs 200. It was his evidence that the first passenger with a paper bag came out then identified his accomplice. He said that the only luggage the conductor knows is the one on the carrier however the passenger usually sits with his luggage. That the ticket would tell them where one had boarded the motor vehicle owing to the fare.
 34. PW9, Police Constable Geoffrey Njuguna, Number xxxx was at Yatta roadblock at night with PC Kibor and APC Kariuki on 19th of July 2015 when he received a report from Corporal Sientei about a robbery in Matuu. At 5.35am while inspecting the cars passing through, he stopped KCC363F Silker Agencies and saw the Appellant seated on the second row left side with a Television set on his lap while covered with a jacket and a yellow paper bag. Upon inquiry as to where he got the Television set, the Appellant said it was his and he was taking it for repair and pointed the 2nd accused person



- who was seated directly in front of him as his witness. The other passengers said that the 2nd accused person boarded the matatu with the items and gave them to the Appellant, they interrogated them but the two accused persons could not explain where they were from. He then identified MFI-17 and MFI-18. He testified that the Identity cards given to him by the Appellant from his pocket, MFI-19 and thereafter MFI-20 did not match the Appellant's face and name. He identified MFI-6, MFI-6, MFI-21 and MFI-22 as the two remote controls, and phones make red ITEL and a Samsung respectively. The accused were then arrested and taken to Matuu and the exhibits collected.
35. When cross examined by the accused persons, he said that the 2nd accused person was seated on the 3rd row seat from the rear, had a bus ticket and was pointed out by the other passengers as an accomplice. He said that he found MFI-20, Samsung phone with him and that he refused to disembark and that is when some passengers used force and he sustained injuries. There was no re-examination.
 36. PW10 Corporal Samuel Sitienei, number xxxx of Yatta Police station was in charge of the Yatta police road block confirmed that he received information from police radio at 4am of a break in and robbery in a house and told PW9 that they should inspect the motor vehicles. He reiterated what PW9 about what transpired at the road block on 19th of July 2015. He added that he called CID Matuu who arrested the accused persons and to all the exhibits.
 37. In cross examination he said that the 2nd accused person was identified by the conductor and passengers and the Samsung phone was found with him. Also, that the 2nd accused person was not injured at the time.
 38. It was his testimony that the other passengers shouted "Mwingine ndio huyu," when re-examined. That the accused person had a small paperbag that had wrapped the phone.
 39. PW2 force Number xxxx David Wambua SSP was recalled on 2nd of October 2017 at the request of the Appellant and he told the court upon cross examination that he was able to give a description of how the assailants were dressed and that may not be reflected in the first report but he knows whom he identified. He said it was the Appellant who attacked him, that the co-accused person was the one who was injured and that at the identification parade everyone had a bandage. He reiterated that they were called in the morning to identify the items recovered. When re-examined, he said they were not allowed to see the suspects before the identification parade.
 40. PW11, Police Constable Edwin Metto was the investigating officer. He said that on 19th of July 2015 at 3.00am upon receiving a call while on duty with PW7 and PC Hussein, a driver about a robbery in Matuu, he proceeded to PW2's home and they were given a report of what had transpired and upon recording the OB, they circulated the information to other offices on night duty including those on patrol. At 5.30am they received information about arrest of two suspects with goods suspected to have been stolen and PW7 went to the roadblock. The items recovered were Tv Set Serial Number E24E8700140400400001, two remote switches, DVD player Aucma serial number 5070529075v black porch and a grey jacket, P exhibit 15 16 and 17. He said that the identification parade was presided over by Inspector Mwachia and referred to P exhibit 8 and 9 where the accused persons were positively identified. He then issued PW3 with a P3 form, P exhibit 10, submitted the piece of stick with a metallic strip, P exhibit 12 to the bomb disposal who said it was an improvised explosive.
 41. He said he interrogated the accused persons and the Appellant said that they had left Nairobi the previous day as the 2nd accused person had a job for him in Matuu. The Appellant recorded his statement, P exhibit 23 before CIP Fredrick Kaya Inspector Nehemiah Ogero, P exhibit 24 where he denied ever knowing the accused.



42. Upon investigation, it was discovered that the two accused persons knew each other and were in communication the previous day. This was done by call data from Airtel on Itel Imei 866499014989344 phone number 07068xxxx and phone number 07068xxxx, Itel was produced as P Exhibit 21, Airtel data MFI-25, Samsung Imei 35998704561540 P. Exhibit 22. He said the victims identified the items recovered as follows; P Exhibit 7, the television set was identified by PW1, P Exhibit 4, 6 and 7 by PW3. P Exhibit 13 and 14, the black perch and the yellow bag were not identified and some items were never recovered. He also said the assailants were identified when the lights were on.
43. On cross examination he stated that he recorded the description of the assailants in his notebook, one was short, the other old. He denied the allegation of torturing the Appellant in his office. He did not do the identification parade neither did he take down the Appellant's statement. He said that the Appellant was caught in a bus running away to Nairobi. That data was captured the previous day at 8.36am where the accused persons communicated with each other.
44. PW3 Albanus Kioko Mbaluka was recalled by the Appellant and in addition to his testimony of September 21, 2016 stated that his statement was formally taken at the police station where he also said he knew and could identify the attackers. He reiterated that the lights were on as he is the one who switched them on and he saw the attackers very well and he saw the Appellant who was at his bedroom.
45. Upon Re- examination, he said he was in PW2's house and he saw them once they got into the house.
46. PW12, CIP Frederick Konya, force number xxxx previously in charge of personnel Yatta Division stated that on 19th of July 2015 he took the Appellant's statement told him that he was a mkokoteni driver who was asked by the Wa Gitonga to accompany him to Sofia to collect some luggage. They travelled on 12th of July 2015, luggage brought on 19th of July 2015 at 3pm when 4 people dropped the luggage for which wa Gitonga gave them money and they boarded back to Nairobi, that the motor vehicle had no passengers. That there was TV and DVD on the seat and when they stopped at the roadblock, they were arrested. He was not told wa Gitonga's full names. He said the Appellant denied being involved in the robbery however he confirmed they received the TV and DVD. He said the statement was given freely and signed on each page.
47. Upon Cross-examination, he said that the Appellant was not in handcuffs and no one else was in the room neither did he ask to have a witness present. He also said he was assisting in the investigations.
48. Upon re-examination, he said that the Appellant alleged that he had been assaulted but did not show any marks of such assault and denied beating him up.
49. That Prosecution closed their case.
50. The Court delivered a Ruling on a case to answer on January 23, 2021 and found that the accused persons had a case to answer.
51. At this juncture, the Appellant made an application to recall PW9 for cross –examination which was allowed and to which he relied on his earlier statement and in addition stated that the vehicle was not taken to the police station because it was not an exhibit, that the accused did not deny the luggage being his. He handed the recovered items to the investigating officer and was not aware about finger prints. That the conductor told him that the accused persons boarded between Matuu and Sofia. When re-examined he stated that the Appellant had a paper bag and had said he was taking the items to the fundi when he was asked where he was taking them.
52. The 1st accused in his unsworn testimony stated that he transports groceries to Nairobi. That on 18th of July 2015 he left for Katililiye near Masinga dam to collect some luggage. He then boarded a matatu



back to Nairobi and at NYS area, the vehicle was stopped whereupon he was woken up and asked to down his seat. He denied knowledge and said his luggage was at the corner but the police did not listen and instead beat him up, cuffed him, beat him with rifles injuring him. He denied knowing why he was in court. He then asked for leniency, to be set free because he was an old man whose children depended on and his wife was convulsing after an accident.

53. The Appellant herein Charles Kitonga John person in his unsworn testimony stated that he used to sell clothes in Gikomba. That on July 15, 2015 went home when he received a called from his employer asking him to return on 19th of July 2015 as he wanted him to collect some items from the store. He said he left Kabati on the night of 18th at 4am for Matuu where he boarded a bus to Nairobi and was charged Kshs 200/-. The vehicle was stopped at NYS roadblock, he was woken up and no reason was given to him for his apprehension, he was handcuffed and taken to the police station. He also said he did not know why he was arrested and asked for his freedom.

Trial Court Judgment

54. The Trial Court in finding the accused persons guilty relied on the case of *Wamunga vs Republic* (1989) KLR 424 at page 26 on the duty of the trial court to examine evidence or identification or recognition carefully and to be satisfied that the circumstances of identification were favourable and free from error before it can safely make it the basis of a conviction.
55. The Trial Court having analyzed the evidence concluded that the two accused persons were in a group of the persons who robbed the victims herein. Further, that even if there was doubt, the incident of the accused persons were found in a Nairobi bound bus 2 hours after the incident ‘with some of the stolen items settles any doubt of their involvement in the robbery’.
56. The Investigating Officer demonstrated that the two accused persons were in contact the previous day and therefore knew each other contrary to their denial of each other in their defence. The court found that the accused defence consisted of mere denials and nothing had been offered to counter any of the allegations levelled upon them.
57. The Trial Court found that the identification parade by the three is additional evidence to the testimonies given by the victims who had seen the accused persons. It concluded that the victims were robbed by three persons two of whom were arrested and charged.
58. The Appellants were found guilty as charged of the three counts of robbery and sentenced to imprisonment for twenty (20) years.

The Appeal

59. The Appellant filed his Grounds of Appeal on August 1, 2022 and stated as follows;
- a. The Learned Trial Magistrate erred in law and fact by failing to find that the charge was fatally defective since it was duplicitous.
 - b. The Learned Trial Magistrate erred in law and in fact by failing to find that the Appellant’s identification was not positive.
 - c. The Learned Trial Magistrate erred in law and fact by failing to appreciate that the identification parade as conducted was not free from error and as such could not stand the test of properly conducted identification parade.



- d. The Learned Trial Magistrate erred in law and fact by failing to find that the confession statement by the appellant was wrongly taken since he did not have a witness present during the said recording as per the dictates of Section 25A of the Evidence Act Cap 80 Laws of Kenya.
 - e. That the Trial magistrate erred in law and fact by failing to appreciate that the alleged confession statement by the Appellant was wrongly admitted into evidence since the same was not produced by the maker and the Appellant never got to make a cross-examination as regards its content.
60. The Appellant prays that the appeal succeed in its entirety, conviction quashed and sentence set aside and he be set at liberty.
61. The appeal came up for mention for directions on July 28, 2022 and directions were taken that the matter would be disposed of by written submissions.

Written Submissions

Appellant's Submissions Filed on September 28, 2022

62. The Appellant filed his submissions on September 28, 2022 in which he advanced five grounds in support of his appeal.
63. On the first ground of defective charge sheet it is submitted that the charges were framed in duplex form. That it would not be correct to frame a charge for the offence of robbery with violence under Section 295 and 296(2) as this would amount to a duplex charge.
64. Reliance was made in the case of *Ibrahim Mathenge vs Republic* Cr Appeal 222 of 2014; *Joseph Mwasura Njuguna & 2 Others vs Republic* [2013] eKLR; *Joseph Onyango Owuor & Cliff Ochieng Oduor vs Republic* [2010]Cr App 358 of 2008 & *Simon Materu Munialu -vs- Republic* [2007] eKLR (Cr Appeal No 302 of 2005).
65. On the ground of positive identification it is submitted that the Appellant was identified by Pw2, Pw3 and Pw4 where the witness stated that;
- “.....identification parade was done later on in the afternoon of that day. We did not see the accused before parade was conducted. Identification parade report MFI-8 and MFI-9. I identified accused 1 because he was the tallest of the people who came to my house. He was also brown. Accused 2 was the second person to enter my house and I was the shortest of the three. I did not lose anything neither was I injured”
66. On cross –examination by the accused 1 Pw 2 stated that;
- “I told them I was able to identify the robbers. I told them how the robbers dressed....Before the parade the police notified me that among the people paraded there is a possibility of the suspects being present. The people looked almost similar height, body stature and looks. I did not see any injuries on you.”
67. On cross-examination by accused 1 after being recalled he stated that
- “.... I told the police that I not identify the assailants. When I met you at the station I did not notice any injuries on you. It was your co-accused who was injured.”



68. It is submitted that when the identification parade form was read out to Pw 2 he changed his statement and said that “Everyone at the identification parade had bandages.”
69. Further Pw 9 who was manning the road block stated that when the appellant refused to disembark from the vehicle some passengers used force and the appellant sustained some injuries.
70. Reliance was made in the case of *Wamunga –vs- Republic* [1989] KLR 426, the Court of Appeal stated;
- “It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can be safely make it the basis of conviction...”
71. It is submitted that a statement under inquiry must be distinguished from a statement under charge and caution. In the instant case the statement under inquiry was recorded by an Inspector of Police contrary to Section 25A of the *Evidence Act*. The charge and caution statement also appeared to have been recorded before the statement under inquiry instead of the other way round.

Respondent Submissions

72. The Respondent filed its submissions dated 28th of July, 2022 the Appellant herein was arrested on July 19, 2015. He remained in custody until the sentencing date of August 10, 2018.
73. Section 50 (2) of the *Constitution* states;
- “Every accused has the right to a fair trial, which includes the right –
- (q) If convicted, to appeal to, or apply for the review by, a higher Court as prescribed by law.”
74. The Court of Appeal on its part, in *Bernard Kimani Gacheru –vs- Republic* [2000] eKLR stated that;
- “It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”
74. In the Court of Appeal in *Ahamad Abolfathi Mohammed & Another –vs- Republic* held that;
- Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(s) of the Criminal Procedure Code was



introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person.

75. It is finally submitted that the period of 2 years, 9 months and 21 days the Appellant spent in custody be factored in his sentence.

Determination

76. The Court considered the Petition, Response, Trial Court record/judgment and evidence adduced before the Trial Court and submissions filed on behalf of respective parties in this appeal.

Jurisdiction

77. This Court is the first appellate court, has legal duty to carefully examine and analyze and evaluate afresh the evidence on record and come to its own conclusion on the evidence but always observing that the Trial Court had the advantage of seeing and hearing the witnesses and observing their demeanor and so the first appellate court must give allowance of the same. This was observed in the case of *Okeno V Republic* [1972] EA 32 where the court stated as follows:

“The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala -V- R (1975) EA 57). 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; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

Evaluation

Duplicity Of Charges

78. The Appellant raised the issue of duplicity of charges by the information spelling the offences of robbery Section 295 & 296 (2) *Penal Code*, and thus suggesting that the Appellant was convicted on 2 separate offences over the same circumstances.
79. The Court considers what constitutes the offence of robbery with violence in the case of *Olouch vs Republic* (1985) KLR where the Court of Appeal stated as follows:-

“...Robbery with violence is committed in any of the following circumstances:

The offender is armed with any dangerous and offensive weapon or instrument; or

The offender is in company with one or more person or persons; or

At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person.”

79. In the case of *Dima Denge Dima & Others vs Republic*, Criminal Appeal No 300 of 2007, it was stated that:

“...The elements of the offence under Section 296 (2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence.”



80. As properly observed by the Trial Court the ingredients of the offence of robbery with violence were set out in the case-law authority of *Oluoch v R*, supra.
81. In this case, not one but three of the elements of the offence of robbery with violence were satisfied. PW2 testified that on the night of 19th July 2015, 3 people entered their house with crude weapons. 1st Accused had a torch and sling on his shoulder that looked like a gun. He ran inwards and the 2nd Accused broke the door and entered and he had an iron bar. There was a 3rd person who was not in Court. He heard an explosion that he thought it was a gun. He called his colleagues, Police on phone.
82. PW3 saw 2 people that night who followed him to his room. One of the persons had a panga and was not in Court. The 2nd person had a crowbar. The one with a panga asked him for his phone and he gave him. The 2nd Accused asked for money and he gave him Ksh 4,500/- from his coat. He asked him for more money and hit him with crowbar on his right shoulder and commanded him to lie down. A 3rd person came in and stood at the door and held onto something that looked like a gun. The Appellant, 1st Accused, with a crude weapon and a make shift stick that could also act as an explosive was found at the scene of the crime. Secondly, the Appellant was in the company of more than one person, he was in the company of the 2nd accused person and another person not before the court. This was stated by PW2 and corroborated by PW3 and PW4. Thirdly, there was threat of violence by show of crude weapons during the robbery and actual violence, before and during the commission of the crime where the 2nd Accused hit PW3 with crowbar on right shoulder. PW5 the Clinical Officer who treated PW3 testified as to the injury on the right shoulder and cut on the face.
83. For these reasons and evidence on record robbery with violence whose ingredients are prescribed under Section 296 (2) *Penal Code* were proved and the robbery herein did not amount to robbery Section 295 of the *Penal Code*. The Trial Court in the Judgment of 20/3/2018 outlined both provisions of Section 295 & 296 (2) *Penal Code* and found as follows;
- “The circumstances of these cases as narrated by the victims herein demonstrated that they were violently robbed by 3 persons, 2 of who were arrested and charged. The upshot of all the above is that I am satisfied that the prosecution has been able to prove their case against the 2 accused persons to the required standard.”
84. The Appellants were found guilty of the offence of robbery with violence contrary to Section 295 which outlines the general offence of robbery and Section 296 (2) *Penal Code* that prescribes ingredients of robbery with violence and punishment. The Statement of offence does not disclose duplicity of offences and did not cause any prejudice to the Appellant. This ground of appeal is dismissed.

Identification

85. On identification in *R vs Turnbull & Others* [1973] 3 ALLER 549 it was held that:

“...The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused under observation? At what distance: In what light: Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material



discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?”

86. On whether, the Accused persons were identified on the said night, PW2 stated that there were security lights outside the house and also illuminated the corridor inside the house. He saw 2nd Accused well after he broke the door and he had a crowbar. PW3 stated that he saw 2nd Accused and he talked to him and asked him for money. The lights were on and the robbers had not covered their faces. He identified the 3rd man who was brown and had wrinkles. They were there for 20-30 minutes. PW4 confirmed that she saw 3 men, one had a panga, another man had an iron bar and the 3rd man had slung something on his shoulder like a gun. The 2nd Accused asked PW3 for money he gave him and he hit him with the iron bar. The 2nd accused appeared young and had a stylish beard cut. He asked her for her phone and she gave it to him. The 3rd man came and stood at the door, he was brown and his face had wrinkles. They were told to sleep and they left when it was all silent. When they came to the sitting room, they found TV remote control, jacket safari boots were missing/stolen.
87. On the issue of identification, I am satisfied that the Accused persons were positively identified by the victims. PW2, PW3 & PW4 gave a description of the Appellant as being brown and tall while the 2nd accused person having a beard. The Trial Court therefore did not rely on the evidence of one witness. The evidence of identification was corroborated by PW2 PW3 & PW4. The identification of the Appellant was not by a single witness as submitted by the Appellant but 3 witnesses. The circumstances as outlined above were conducive for proper identification, the lighting was sufficient, the witnesses and Accused persons were in close proximity to facilitate identification and they Accused persons spoke to the Witnesses/Victim. I therefore find that the commission of the offence has been proved by the evidence on record.

Identification Parade

88. On the issue of identification parades and whether or not it was properly conducted. All in all, the evidence tabled before the court shows that the identification of the Appellant by PW2 is corroborated by PW3 and PW4. The Identification parade was conducted by Inspector Mwachia who did not testify in Court but the Identification Reports were produced as Exhibits 8 & 9 by PW11 PC Edwin Metto the Investigating Officer. The reasons for non-attendance were not recorded so as the Trial Court could consider the appropriate way forward in ensuring a fair trial.
89. The Court of Appeal in *Samuel Kilonzo Musau vs Republic* [2014] on identification parade indicated thus:

“The purpose of an identification parade, as explained in *Kinyanjui & 2 Others Vs 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.”



90. Although the Accused persons from the Identification Parade Reports Exhibit 8 & 9, the appellant was positively identified, it is not safe for the Court to rely on identification parade evidence, where the Identification parade Officer was not called to testify on the conduct of the ID parade. This is cardinal to the tenets of a fair hearing under Article 50 of [COK 2010](#). In the absence of reasons why the Officer was not called or his whereabouts could not be confirmed or whether there was any reasonable explanation why the ID Parade Officer could not testify in Court being made by the ODPP/ Prosecution to the Trial Court so as to consider production of the Report by other legal means; mere production of the Identification Parade Forms by the Investigation Officer and not the ID Parade Officer was not sufficient and proper in law. The ID Parade Officer ought to have been subjected to cross- examination by the Accused persons for the Trial Court would to test the veracity of the evidence and the credibility of the witness. For this ground the conduct of ID parade cannot be legally relied upon by this Court even if from the record, the Accused persons did not object to the production of the said reports. This ground of appeal is upheld.

Statement Under Inquiry And/or Charge & Caution Statement

91. It is submitted that a statement under inquiry must be distinguished from a statement under charge and caution. In the instant case the statement under inquiry was recorded by an Inspector of Police contrary to Section 25A of the [Evidence Act](#). The charge and caution statement also appeared to have been recorded before the statement under inquiry instead of the other way round.
92. The Appellant submitted that Statement under Inquiry Exhibit 24 recorded by Inspector Nehemiah Ogero was/is contrary to Section 25 A of [Evidence Act](#) & The [Evidence \(Out of Court Confessions\) Rules 2009](#) and therefore the confession(s) were irregular and inadmissible.
93. The appellant relied on the case of *Anyangu & Others vs Republic* [1968] EA 239 & *Israel Kamukolse & Anor vs Republic* [1956] to fortify the legal position on taking of confessions.
94. On perusal of the Trial Court's record and specifically judgment of 20/3/2018, this Court finds the evidence by PW12 was that he took statement under enquiry of 1st Accused Joseph Musyoka Engau and stated there was no admission to commission of the robbery. Secondly, The Trial Court did not rely on any of the statements either statement under enquiry nor statement under charge and caution and it is futile to consider merits and/or demerits of the Confession/Statements.
95. On the issue of the confession produced by PW 12 the Trial Court did not consider or rely on it, it was not of any probative value. Page 14 of the Trial Court judgment provides that;-

“I therefore have no doubt that the two accused persons were in the group of the persons who robbed the victims herein.

But even if there was some doubt, the subsequent event wherein the two were found in a Nairobi bound bus with some of the stolen items puts paid to any lingering doubts as to their involvement in the robbery. They were arrested within two hours of the robbery and found with the stolen items. The investigating officer was able to demonstrate through the phone records that the two were in constant communication with each other the previous day and therefore knew each other in spite of their claim to the contrary in their defence.”



Recent Possession

96. In *Isaac Ng'ang'a Kabiga alias Peter Ng'ang'a Kabiga v Republic* Cr App No 272 of 2005(UR) the court held that:

"[Recent possession] 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."

97. In the case of *David Mugo Kimunge vs Republic* CA 4 of 2014 [2015] e KLR the Court considered the doctrine of recent possession as follows;

"Where unexplained recent possession and that goods were stolen is established by the Prosecution for possessing stolen goods an inference of guilty knowledge upon which failing other evidence to the contrary, a conviction can rest.....two questions , that of recency of possession and that of contemporaneity of any explanation must be disposed of before the inference may properly be drawn."

98. The robbery occurred on the night of July 19, 2015, PW1 confirmed theft of TV Make Braum, jacket, phone Samsung, 2 remote controls & DVD and produced receipt for TV -MFI -3. The same evidence of items stolen was confirmed by PW2, PW3, PW4 & PW7 who went to the Complainant's house that same night, they went to the Police Station and recorded statements. PW2 Senior Superintendent of Police at Police Training College testified before the Trial Court that he saw on being woken up by his brother, PW3; 1st Accused with a torch and a sling and the 2nd Accused broke the door which they had locked. The 2nd Accused an iron bar and a 3rd person not in Court was present too. PW3 was accosted and injured on the forehead and shoulder and they stole Ksh 4,500/- from him and a brown juacket. PW2 called the Police on phone and Police came from Matuu as the Accused persons went to his brother's room. PW2 gave their mobile phone numbers to the Police.

99. PW2 informed the Police of the incident and to check at road blocks. The report was relayed to Intelligence Officers and PW2 was informed that the mobile numbers were operating near Sofia Market. At 5am Police Officers at Kithimani called and said they apprehended 2 suspects with matching description of items stolen and one suspect had a tv on his laps while in the Silker Shuttle. PW2 went arrested the 2 suspects and recovered TV, DVD 2 Remote controls and 2 mobile phones Itei, Samsung jacket and yellow bag.

100. On searching the Appellant/1st Accused, PW7 found him with bus tickets dated July 18, 2015 from Nairobi to Matuu for ksh 400/- and for Matuu-Nairobi of 19th July 2015 marked MFI-15 & MFI 16. PW8 Conductor of Silker Agencies Vehicle Reg KCC 363M confirmed on 19th July 2015 they left Matuu at 3am and at NYS roadblock they were stopped. The Police Officers enquired of passengers who boarded from Sofia and he pointed to the 2 men who boarded from Sofia, the Appellant 1st Accused and 2nd Accused.

101. The Police found TV Remote DVD Torch and black shoes. PW9 & PW10 on July 19, 2015 were on a roadblock at Yatta at night. They were informed of a robbery and were asked to inspect all vehicles passing through. At 5.35am, they stopped a Vehicle KCC 363 F Silker Agencies. PW9 went in and



saw one of the Accused seated with a Tv on his lap covered with a jacket and he also had a yellow paperbag. The Appellant said he was with his witness 2nd Accused and he was taking the TV for repair. Passengers told him it was 2nd Accused who boarded with items and gave 1st Accused. The Accused persons were asked to disembark. PW9 & PW10 interrogated them and recovered TV, DVD decoder, jacket, remote controls and yellow paperbag. They had mobile phones they claimed were theirs, ITEL & Samsung. They handed them over to the Police from Matuu Police Station. Possession of stolen items by the 1st Accused & 2nd Accused and both Appellants were positively identified during the robbery by PW2 & PW3 and the circumstances were favourable for identification; there was electricity light and they were in close proximity. The evidence of robbery with violence occasioned by the Accused Persons/Appellants on 19/7/2015 proved by evidence of PW1, PW2, PW3 & PW4 and on the same night at 3 am PW7 visited the scene /house of the Complainant.

102. PW8, the conductor of motor vehicle Reg KCC 363M confirmed that on 19th/July 20, 2015 they were stopped at NYS roadblock and confirmed to Police that the 2 Accused persons/Appellants boarded the vehicle at Sofia. The Appellants/Accused persons had a yellow paper bag which on being searched and interrogated by Police Officers PW9 & PW10; the TV flat screen, remote torch, DVD, jacket that covered TV and black shoes were recovered and positively identified later by Complainants and victims of the robbery with violence. The 1st Accused had 1 of the stolen phones make-ITEL and the 2nd Accused had the other stolen phone; make-Samsung. They also produced their ID cards. The items were positively identified by Complainants and PW 1 produced receipt for the TV in Court during Trial.
103. The evidence on record adduced by the Prosecution during trial establishes recent possession of the stolen items during the robbery that occurred on July 19, 2015 night and these items were recovered a few hours later, on the early morning of July 20, 2015. There was no case of mistaken identity, as PW 8 identified the 2 Accused persons as the 2 people who boarded the vehicle from Sofia. On the account that the items were stolen during the robbery and were recovered in the possession of the Appellant, and indeed no rebuttal was offered by the Appellants in their Defences that cast doubt to the Prosecution case.
104. The Appellants failed to give reasonable accounts of possession of the stolen items coupled with the fact that they were positively identified, the Court finds that the recent possession of stolen items without reasonable explanation by the Appellants makes the Prosecution case is based on cogent and tangible evidence that the Appellant and 2nd Accused and another not in Court committed the offences charged.
105. In the case of *Peter Njagi Muchangi & 3 Others vs Republic* [2013]eKLR the C.A. referred to the case of *Francis Kariuki Thuku & 2 Others vs Republic* [2010]eKLR, the Court held;

“Concerning the application of the doctrine of recent possession to the facts in the case, we are of the view that the appellants did not offer any reasonable explanation of their possession and therefore the reliance by the superior court on the holdings in the cases of R V Loughin 35 Cr Appl 269 by the Lord Chief Justice of England and this Court’s own decision of Samuel Munene Matu V R Criminal Appeal No 108 of 2003 at Nyeri demonstrates that the doctrine was properly applied. The recovery of the items in the case before us was within 7 days whereas in the Matu case (*supra*) a period of 20 days was held to be recent. We accordingly uphold the superior court’s view of the law on the point. In this regard we would re-echo the decision of this Court in the case of Hassan -vs- Republic [2005] 2 KLR 11 where as regards recently stolen goods it delivered itself thus:-



“Where an accused person is found in possession of recently stolen property in the absence of any reasonable explanation to account for this possession a presumption of fact arises that he is either the thief or a receiver.”

In R v Loughin 35 Cr App R 69, the Lord Chief Justice of England said:-

“If it is proved that premises have been broken into and that certain property has been stolen from the premises and that very shortly afterwards, a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is the housebreaker or shop breaker.”

106. In view of the foregoing, having considered the evidence adduced in the Trial Court in totality this Court finds that the Trial Court rightly relied on the doctrine of recent possession of the stolen items stolen from the Complainants from a robbery with violence that occurred on the night of 19/7/2015. PW2 & PW3 identified the Appellants as the assailants on the night of the robbery. Although the identification parade evidence was not tested through cross examination as the ID Parade Officer failed to attend Court and the Confession was not relied upon in evaluation of the evidence against the law. The Trial Court relied on identification of the Accused persons on the night of the robbery and recent possession of stolen goods only and not on the ‘confession’ by the Appellant as it is not referred to in the said Judgment. This Court finds the Trial Court based its conviction and sentence on cogent and tangible evidence on record.
107. The Trial Court in its pre-sentence report indicated that the period in custody is duly considered but did not indicate the period the Appellant was in custody during trial until he was convicted. The Charge Sheet/Information shows date of arrest as July 19, 2015 and the Appellant and 1st Accused person remained in custody until conviction on March 20, 2018 – 2 years and 8 months. Under Section 333(2) [CPC](#) the period in custody ought to be taken into account in computing the sentence of Twenty (20) years. It shall commence from July 19, 2015.
108. As a result, the Appeal herein lacks merit and is hereby dismissed save for the computation of the sentence whereby the 20 years imprisonment period shall commence from July 19, 2015.

It is so ordered.

**DELIVERED SIGNED & DATED IN OPEN COURT VIRTUALLY ON 22ND NOVEMBER 2022.
(VIRTUAL/PHYSICAL CONFERENCE)**

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

CHARLES KITONGA JOHN – APPELLANT (VIRTUAL)

ODPP/PROS – MR MWONGERA

GEOFFREY/PATRICK - COURT ASSISTANT(S)

