



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

(CORAM: R. MWONGO, J.)

CRIMINAL APPEAL NO. 34 OF 2019

JOSEPH NJUGUNA MUHIA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 29 OF 2019

JAMES NGANGA NJOKERIO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence dated 10th September, 2019

of Hon. K. Bidali (CM) in CMCRC No. 378 of 2017)

JUDGMENT

Background

1. These appeals, were filed separately but were consolidated as they emanate from the same lower court suit, viz CMCRC No. 379 of 2017.
2. In the lower court the Appellants were charged and convicted with robbery with violence contrary to **Section 296 (2)** of the **Penal Code**. The particulars of the offence were that on 9th May, 2014 at Muimui Village, Kipipiri, Nyandarua, they robbed Margaret Wanjiru Kung'u of a mobile phone worth Kshs 6,000/= namely Samsung Duos, and cash of Kshs 800/=, and that at the time of the robbery they were armed with a pistol and wounded the said Margaret Kung'u . The 1st Appellant was also charged and convicted with unlawful possession of firearms.
3. The Appellants were both sentenced to death.
4. Mr. Ondieki, to the Appellants filed 24 supplementary grounds of appeal. They are summarized in the following categories:
 - i) *Material contradictions in evidence.*
 - ii) *Failure to call crucial witnesses.*
 - iii) *Failure to properly identify the accused or held identification parade.*

- iv) *Making a conviction without proof of the charges beyond reasonable doubts.*
- v) *That the trial court shifted the burden of proof to the defence.*
- vi) *Disregarding defence evidence.*
- vii) *Reliance on circumstantial evidence which was weak.*

5. For purposes of determination of issues based on the grounds of appeal, the consolidated issues for determination in both appeals may be summarized as follows:

- a) *That the evidence on identification was inadequate.*
- b) *That the evidence availed by the prosecution was contradictory, uncorroborated and mostly circumstantial.*
- c) *That the prosecution evidence did not adhere the standard of proof beyond reasonable doubt, in particularly as to possession.*
- d) *That the trial court did not properly consider to appellants defences including the defence of alibi.*
- e) *That the appellants' alibi was not objectively analysed.*

6. The prosecution availed ten prosecution witnesses, the tenth being Corporal Pius Njogi. The two accused persons gave unsworn evidence and did not call any witnesses.

Facts

7. This Court's role is to review and re-evaluate the entire evidence availed at to make its own conclusions noting that it did not itself hear the witnesses or see their demeanour. (**See Okeno v Republic [1972] EA 32**).

8. PW1 Margaret Wanjiru Kung'u had a normal day running her Agrovat shot at Ndinda in Kinangop. She closed down at 7.00pm. Her 9 year old daughter was with her. Her driver, Joseph Kariithi had their lorry ready and took them home to Mumuye. It was night so they had their headlights on. When they got to the first gate of her compound, two men appeared from the fence. They smashed the window on her side and shot at her. She felt a bullet crash into her body. She screamed.

9. Suddenly an unarmed man came to her side and asked her for money. She said she had none, but he found and took Kshs 800/= and her Samsung Duos phone which she had been holding. She did not know the man. He walked off in front of the lorry then disappeared.

10. Meanwhile, PW3 Francis Ngumu Githonge PW1's husband was at home. He had asked one of his workers, Kamau to open the gate when he saw the lorry lights in their drive. Shortly, he heard a first gun shot, and a second one. Then he heard his wife screaming from the vehicle. He went into his neighbour's compound 200 metres away and made calls for help. A third gunshot sounded, and he heard his wife shout "wamenia". He saw two people running from the vehicle towards the main road. He did not recognize them.

11. From the main road, PW3 heard a fourth gunshot, and the roar of a motor bike, which took off into the right. After a while, he went to where the vehicle was and found his wife walking in pain towards the house. She was bleeding from the back where he saw she had a hole. He called the neighbours who responded to the screams and calls for help. He went to the car. Its windows were smashed and the ignition key was not there. He ran and got keys from his house and came back. Kariithi, the driver, then came to the scene.

12. PW3 told Kariithi that PW1 needed to go to hospital and they put her into the vehicle and they proceeded to Kinangop Catholic Hospital. He left his worker, Kamau, at home. At hospital, the doctor found a bullet lodged in PW1's back, so they admitted her saying it would be removed the following day.

13. PW3 further testified that the day after the incident they went to hospital then passed by the Agrovat shop. Neighbours told him they had seen and tried to stop a motor cycle in vain at Orida Petrol Station next to the shop. He made a call to Corporal Njagi of Kipipiri Police Station who advised that they should detain the motorcycle. They locked it in his vehicle, and Corporal Njagi came for it the following morning.

14. At the same time when the police came they picked spent cartridges which he identified as MFI 5.

15. On 10th May 2014, he was called by the Engineer Police Station officers who told him the suspect had been arrested. They later came to his home with one of the suspects and interviewed PW2.

16. In cross-examination he said he did not attend any police identification parade; that he heard about five gunshots on the material night; that the motorbike was seen by neighbours; that he carried the motorcycle to his shop; that it was not dusted for fingerprints; that neighbours recognized the motorcycle by its colour, the fact that it had a puncture and they had also followed it.

17. PW3 further said in cross-examination that he heard five gunshots; that the neighbours found the motorbike at Boda Petrol Station; that the owners of the petrol station said the motorbike was brought by someone they did not recognize; that he was the one who called the Chief,

and that Corporal Njagi had instructed him to secure the motor bike. He could not remember the number plate of the motorbike.

18. The narration by PW2, Joseph Kariithi was that he was at PW1's Agrovet Shop at 6.30pm on 9th May, 2014. He had completed other assignments in vehicle registration number KAN 835E, a canter. He is PW1's driver. The shop closed and PW1 and her daughter entered the vehicle, and he drove them home.

19. As they reached the second gate of PW1's home, they were confronted by two men. The men fired at the vehicle and the left side window was shattered. The assailants ordered him to stop and he did. They asked for money. He said he had none. One of them passed by the front of the lorry to the left side, and other came towards him. The one near him took the vehicle, ignition keys, his wallet and Alcatel phone. After that he went to the other side going round by the back of the vehicle.

20. PW2 fled and hid in a bush some 20ft away. He could see what was happening at the vehicle. After a few minutes the men left, leaving PW1 in the vehicle. The two men were picked by a motorcycle. The moon was bright and he saw it clearly as they boarded it. He heard it roar off.

21. PW2 could hear PW1 crying, saying she had been shot. Shortly after, PW1's husband came with the key for the vehicle. They then took PW1 North Kinangop Hospital, and left PW1's child with an aunt. She had not been injured. PW1 was admitted. PW2 left for home with PW3 and another man the same night.

22. The next day PW2 went to the police station to record his statement. He had been robbed of his phone and Shs 1,040/=. The police had already been told of the incident by neighbour. After a day, the police came and collected cartridges. Later, he was told that his phone had been recovered. That was one day later. Some suspects were brought to him at home at about 12.00 noon. One of the suspects had his phone which he had tied with a rubber band. It was an Alcatel telephone and had a sim card.

23. When shown the phone in court PW2 recognized it. The phone was marked as MFI 1. The person who had taken his phone, the 1st accused, was not in court as he had since died.

24. In cross-examination PW2 stated that the headlights of the vehicle were on during the incident and the moonlight was also very bright. He also stated that he did not see either the 2nd or 3rd Accused (the Appellants). He confirmed that he had only identified the 1st accused who was not in court.

25. Senior Sergeant AP, James Kiprof Cheptogoch gave evidence as PW4. He was attached to Nyandarua North. On 10th May, 2014 he was at Ndunyu Njeru Centre when he received information from members of the public that some young men at Nyama Villa bar were acting suspiciously. He alerted his supervisors then organized with some other officers and they went to the bar. They were directed to Room 5. They ordered the occupants to open the door and made them lie down.

26. They interrogated the men who, gave their names as Paul Irungu and Joseph Njuguna. They searched the room and found a hole in a blue mattress (MFI 6). When they checked in it they found two guns (MFI 7 (a) and MFI 7 (b) serial numbers EP1294191 and ET17122246), respectively. They noted the serial numbers of the guns and the number of rounds of bullets each had. MFI 7(a) had two rounds and MFI 7(b) had six rounds (MF 9 a-f).

27. The police then searched the bathroom where they recovered three phones. An Alcatel blue (MFI 4), Samsung Duos MFI 10 which Joseph Njuguna claimed to be his and a Samsung Galaxy S2 (MFI 11) which Paul Irungu claimed was his. PW4 arrested the two. By then his supervisors had arrived. The accused told them there was another suspect at Engineer called James Nganga. He, PW4 confirmed that the 2nd Accused Joseph Njuguna Muhia was one of the accused person he arrested.

28. In cross-examination, he stated that the 2nd Accused is the one who told him that there was another suspect, James Nganga Nyakaria (3rd Accused) but he, PW4, was not the one who arrested the 3rd Accused.

29. In re-examination PW4 said that the 3rd Accused was mentioned by the 1st and 2nd Accused.

30. PW5 SSP Lawrence Ndhiwa, a Firearms Expert testified as PW5. He has been a firearms expert for 18 years.

31. PW5 testified that he received two pistols with serial numbers EP1294191 (MFI 7a) and ET11122246 (MFI 7b); two magazines B1 and B2, two rounds C1 and C2; 6 rounds D1-D2, spent cartridges E, F1, F2, and F3 and a metallic bar. He testified the pistols found to be capable of firing; he was able to test fire MFI 9 - 8mm blanks; D1 - D6 could be fired. He prepared a report and produced it as Exhibit 14 (a) and 14 (b).

32. PW6 Dr. Julius Ndwiga is the medical superintendent at Engineer District Hospital. He testified that he was familiar with the signature of Dr. Maingi who examined and filled the P3 form for Margaret Wanjiru, the complainant. She had a deep wound on the left upper back made by a gunshot. She had undergone surgery. The injury was made by a sharp object. She had been discharged from North Kinangop Catholic Hospital and treated for gunshot. The Discharge Summary was dated 16th May, 2014 and produced as Exhibit 2; and the P3 Form was produced as P. Exhibit 1. She was treated for gunshot wound. On 10th May, 2014 the bullet was removed under anesthesia. A medical report by Dr. Philip confirming her admission at North Kinangop Hospital on 9th May, 2014 was produced as Exhibit 3.

33. PW7 APC Peter Njogu was an officer at Ndunyu Njeru AP Post. He testified that on 10th May 2014 at 7pm whilst in the office he got a report from members of the public that there were suspicious people at a bar. With other officers Inspector Chelangat and Rono, they proceeded to Nyama Villa Bar at Ndunyu Njeru. On reaching, the caretaker told them the men were in Room 5.

34. They proceeded to Room 5 in the lodging and knocked on the door. The occupants opened and they saw two men inside. They ordered them to surrender, searched them and found nothing. On looking at the mattress they saw a cut in it (MFI 6). They looked inside and found 2 pistols 7a and 7b and recorded the serial numbers, recovered 8 rounds of ammunition MFI 8a - b and 9a - b. They also recovered 3 phones MFI 11, 4 and 10. The suspects gave their names as Paul Irungu Kamau and Joseph Njuguna. Accused 2 was one of the men arrested.

35. In cross-examination, PW7 said he got information from members of the public; that he arrested Accused 2 in the room; that he was informed that the accused had been in the room for 2 days. In re-examination, he said they were told one of the men looked a "wariah" and that is the description they gave to the bar attendant.

36. PW8 Martin Gathuo sells eggs and sausages in Engineer. On 9th May 2014 at 6pm, he testified, he lent his motorbike KMCU 195P make Lion, colour red, to a man he knew as Joseph Nganga to go and see his brother Moteira. Nganga was to return it at 8pm, but at 8.30pm he called PW8 to say it had a puncture.

37. The next morning he met Nganga who told him the motorbike was at the Nector Petrol Station. PW8 went there and it was not at that station. When he called Nganga he said it was at another station. So PW8 decided to report to the police in OB No. 20/10/5/2014. He then informed his friend Mrefu to help him search for his motorbike. Mrefu later told him he had seen it at Tulaga Petrol Station where it had a puncture.

38. The police from Kipipiri later called him, and on asking for details they told him the motor bike had been used by robbers. They told him they needed to arrest Nganga. Nganga had, however, disappeared. After 3 days he was told Nganga was at Chuma. He was arrested on 15th April, 2014. PW8 identified Nganga as Accused 2.

39. In cross-examination, PW8 said he knew Nganga as Joseph Nganga, but heard in court that he was James; that he recorded his motorbike as KMCU 195P and that he went with the police when Accused 2 was arrested. He said they were close friends so he did not ask questions when he borrowed the motorcycle. In re-examination he said he knew the accused as Joseph Nganga. The names James Njokeria were brought to his attention in court. He witnessed the arrest at Chuma.

40. PW9 Sergeant John Rono was on general duties at Kinangop Police Station on 10th May, 2014. He had gone on patrol and went to AP Camp at Ndunyu Njeru where he was told by Sergeant Cheptogot that there were two suspects armed with guns in a bar called Villa. They searched the room and Sergeant Cheptogot said he could feel some metal in the mattress. He removed the metal and found 2 guns Exhibit 7a and 7b in the mattress MFI 6.

41. They arrested Paul Irungu (Deceased) and Joseph Njuguna (Accused 1), and took them to the police station. There they mentioned the name of Nganga Njokeria who had invited them.

42. PW9 was also present for the arrest at Chuma on 15th May, 2014. The police were led to Accused 2 at Chuma by PW8 Martin Kirima Githua. In cross-examination PW8 said the suspects referred to Accused 2 as Nganga; that Accused 1 had led them to 2nd Accused's home but he was not there; and that Sergeant Cheptogot had received information from informers.

43. PW10 Corporal Pius Njogi was at Kipipiri Police Station at 8pm on 9th May, 2014 when the Deputy OCPD called him and told him there had been a robbery at Mumui area. He mobilized three officers PC Mwita, Mwalimu and Kamau, and went to Mumui. They met the Deputy OCPD there. They were told the circumstances of the attack on the complainant. He recalled the incident whereby her vehicle was attacked at their gate.

44. At the scene, he found one cartridge 22mm and stored it. The victim needed surgery. On 10th April, he went back to the scene and found 2 more cartridges one of 22mm and one of 9mm. At 11.00am he was told a motor bike was parked at Ndinda Petrol Station from the previous night. He found the motorbike Registration Number KMCU 195P Lion. He followed up on the motorcycle and found it was owned by Martin Kirima Githua who said he had lent it on 9th May, 2014. The 3rd Accused never returned it.

45. The Appellants gave unsworn statements in their defence. The 1st Appellant said that on 10th May, 2014 he went to buy potatoes in Kinangop, and met a farmer at Ndunyu Njeru at about 12.00pm. They harvested potatoes till 6.00pm. At 8.00pm he went to the club at Ndunyu Njeru, ordered a drink then, on asking, he was directed to the toilet. He heard some noises whilst he was in the room. When he came out he found some people lying down and, as he passed, the police demanded to know where the gun was. They arrested him - despite his protests that he was a bar patron - and taken to police station. He was accused of robbery and charged.

46. The 2nd Appellant stated that he was a trader dealing in beans. He woke up early on 15th May, 2014 and went to work and later to the shamba. He returned home at 7.30pm, and soon when he heard a knock on his door. Police entered and searched his house but found nothing. They arrested him and took him to Miharati Police Station where he was charged with the offence. He denied committing the robbery.

Analysis and Determination

47. It is for this Court as the first appellate court to re-evaluate and weigh all the evidence in the trial court and come to its own conclusions being careful to note that it neither heard the witnesses nor saw their demeanour. **Okeno v Republic [1972] EA 32.**

48. The offence of robbery with violence is provided for in **Section 295 and 296 (2) of the Penal Code.** The provisions are as follows:

"295 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.”

“296 (2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

49. To establish the offence there must be proof that:

- a) *an item was stolen; and*
- b) *the offender was armed with a dangerous weapon or*
- c) *was in the company of another, or ;*
- d) *the offender used violence against a person whilst committing the offence.*

50. These are the ingredients that must be proved. In this case the amended charge sheet indicates that the following items were stolen from the complainant. PW1: A mobile phone Samsung Duo valued at Kshs 6,800/= and Kshs 800/=. This covers the aspect of stealing.

51. As for the second ingredient of being armed with a dangerous weapons, it was alleged that two guns which were inextricably linked with the robbery were found stashed in a mattress in the room where the 1st Appellant was arrested. The third ingredient is evident in that PW1, PW2 and PW3 all testified that there were at least two people they saw during the robbery though they could not identify them. A third person, who availed a motorbike as a getaway vehicle, was also involved. Finally, violence is alleged in the fourth ingredient fact that PW1 was shot in the back by the assailants as testified by herself, PW2 and Dr. Ndwiga in the P3 Form.

52. In evidence, PW1 testified that she was robbed of a Samsung Duos and Shs 800/=. Although she was shown a Samsung Duos phone, she was not able to identify it as hers. She said:

“The phone looks like the one I had.”

53. In the event, the phone PW1 was shown, which was found in the hotel room where Accused 1 (1st Appellant) Joseph Njuguna was arrested with hidden guns and items, was not marked for identification or produced. Her phone was never recovered as per evidence of PW10.

54. The appellants argue that the evidence linking them to the robbery is weak and circumstantial. That argument cannot apply to the 1st Appellant because the link between him and the robbery is quite direct.

55. The 1st Appellant was arrested in Nyama Villa Bar Room 5. This was corroborated by the evidence of PW4, Sergeant James Kipro, PW7 APC Peter Njogu, PW7 Sergeant John Rono and PW10 Corporal Pius Njogi.

56. During his arrest, the 1st Appellant was together with one Paul Irungu who passed on before the trial. At the time of their arrest in Room 5 at Nyama Villa Bar, two guns and eight rounds of ammunition were recovered hidden in the mattress in their room. The guns were exhibited as Exhibit 7a and 7b. The ammunition was exhibited as Exhibit 8a - 8b and 9a - 9b.

57. The guns and bullets were subjected to ballistic testing by a Firearms expert, PW5 who analysed and tested them. He gave his findings in his report P. Exhibit 14a and b. Both guns A1 and A2 were Ekol Pistols of 9mm and 8mm bore; both were found to be capable of being fired. The ammunition found in the Room No. 5 were:

- Two 9mm caliber which were both test fired in Pistol A1 successfully.
- Six 8mm caliber blanks, three of which were picked at random and successfully fired in pistol A2.

58. There was also evidence by PW3 that a police officer picked spent cartridges at the scene, specifically at the gate of his house, the day after the incident. PW10 testified that he collected one 22 mm cartridge on 9th April. The following day he collected two more cartridges one of 22mm and one of 9mm.

59. However the evidence concerning the spent bullet cartridges by PW3 was that he saw the bullets being collected:

“They (police) visited the crime scene. They picked spent cartridges. I saw the spent cartridges. I could recognize them if I saw them again. These are the spent cartridges - 12 in number - MFI 5. The police went to where I had heard the last explosion and they picked one cartridge there.”

60. The other eyewitness who was involved in collecting and securing spent cartridges was PW10 Corporal Pius Njogi. He testified that:

“The robbery was at the gate of the home. I managed to collect one cartridge 22mm and stored it.....

Next day on 10th I went back to the scene and I found 2 more spent cartridges of 22mm and are for 9mm.”

Later in his testimony, he said he:

“Prepared an exhibit memo and forwarded to Ballistics.....

The experts examined the gun and found a match with the spent cartridges.”

61. The Exhibit Memo Form dated 19th May, 2014 shows that what was sent to Ballistics were the following items:

- Exhibit marked “E” spent cartridge of 9mm ammunition.
- Exhibit marked “F1 - F3” spent cartridge of unknown calibre.

It was desired to establish from which firearm exhibit marked “E” and “F1-F3” (spent cartridges) was fired from. The Ballistics expert received four cartridges, not twelve referred to by PW3 and one more that PW10 said he collected.

62. PW5 reported as follows of Exhibit ‘E’

“Exhibit marked ‘E’ was fired from (Gun) Exhibit A1 Serial No. EP1294191.

Exhibit marked ‘F1 - F3’ were fixed from (Gun) Exhibit A2 Serial No. ET11122246.”

The guns are all the ones which were found in the mattress in Room 5 where the 1st Appellant was arrested; and also the ones which were shown to be capable of firing the communication found in the said mattress.

63. Despite the contradictions noted above, it is my view that the link between the 1st Appellant and the robbery that occurred on 9th May, 2014 is sufficiently established to conclude beyond reasonable doubt that the 1st Accused was complicit in the robbery.

64. In addition PW10 testified that:

“I was called to hospital and given the bullet that had been retrieved from Margaret Wanjiru MFI - 16 (identified).”

MFI 16 in the exhibit list is indicated as “bullet head (removed from Margaret Wanjiru)” the complainant.

65. Similarly the bullet head was availed to the Ballistics expert as “Exhibit marked ‘G’ Bullet head. The expert was required to establish which of the exhibited guns and magazines if any, namely ‘A1’ (gun) and A2 (Magazine) and B1 (gun) and B2 (Magazine) can be fixed when charged. All analysis PW5 reported:

“Exhibit G is consistent with the spherical bearings waded in exhibits D1 - D6 above.”

66. Exhibits D1 - D6 were the six round of ammunition of 8mm calibre. In his testimony PW5 said that G is a spherical bearing 6.4mm in round diameter. It had no markings and looks similar to D1 - D6, the other live rounds of ammunition from which three rounds were randomly selected and successfully test fired in Exhibit A2 (the pistol Serial No. ET11122246 found in the said mattress.

67. Thus the link between the 1st Appellant and the actual bullet that was used in shooting the complainant is so close to all but ascertain that the gun used to shoot the bullets in the cartridges (F1 - F2) fired from the same gun, and which cartridges were found at the scene.

68. The trial magistrate found that the Accused was in constructive possession of the weapons which were linked to the robbery. A thing is in possession of someone when he has power to deal with it as owner to the exclusion of others. This was held in **Hussein Salim v Republic [1980] eKLR** where the Court of Appeal said:

“The Court considered and approved the definition of “possession” to be found in Stephen’s Digest of the Criminal Law, which is as follows:

“A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in the case of need.”

We take this definition to mean, not that any legal title has to be proved, nor that access to the complete exclusion of all other persons has to be shown, but that a possessor must have such access to and physical control over the thing that he is in a position to deal with it as an owner could to the exclusion of strangers. In our view the evidence in this case satisfies those requirements, and we agree with the courts below that possession was established within the meaning of the Dangerous Drugs Act.”

This definition was satisfied in the present case.

69. It was properly argued by the Appellants that the trial court relied on circumstantial evidence to reach its conclusion to convict. Circumstantial evidence may be properly relied upon when the evidence so strongly points to an inference of guilt that no other reasonable hypothesis could be made. This has been the position of the law for many years and was recently restated by the Court of Appeal in **PON v Republic [2019] eKLR** where the Court said:

“To base a conviction entirely or substantially upon circumstantial evidence, it is necessary that guilt of the suspect should not only be a rational inference but also it should be the only rational inference that could be drawn from the circumstances. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the suspect not guilty. This principle has been applied for years in this jurisdiction and the two leading judicial authorities that have stood the test of time are Rex V Kipkerring Arap Koske & 2 Others [1949] EACA 135 and Simoni Musoke V R [1958] EA 71. In Rex V Kipkerring (supra) the court explained that;

“In order to justify a conviction on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”

70. In the present case there is no escaping the fact that the 1st Appellant had unexplained possession of the firearms which were specifically proved to have been used in the robbery. The conviction on that basis by the trial court was not farfetched when all the circumstances are taken into account.

71. With regard to the evidence against the 2nd Appellant, the evidence is rather precarious. It was alleged by the prosecution witnesses that his name was given to them. According to PW4 Sergeant Cheptogoch, the 2nd Appellant name was given to them at the bar by Paul Irungu (the deceased) who was initially the 1st Accused. The name given was James Nganga. PW9 said the name given to them at the police station was Nganga Njokeria; and that he went to Chuma area to arrest the accused.

72. By some coincidence the 2nd Appellant had on the material night allegedly borrowed a motorbike from PW8 Martin Kirima Githua, which Martin reported to have been stolen on 10th May 2014, after the borrower did not return it. PW8 knew the 2nd Appellant as Joseph Nganga. PW8's friend Mrefu, who was not called to testify, said he had seen the motor bike which was at Tulaga Petrol Station.

73. The prosecution evidence was that the motorbike had been used as a getaway vehicle after the robbery. None of the witnesses who saw the motorbike that night testified. In any event, PW3 testified that his neighbours - George Ithua and Isaac Mwangi - had recognized the motorbike which they saw at Orida Petrol Station. PW3 therefore called Corporal Njagi who advised him to detain it and he, Corporal Njagi, would “*come for it.*”

74. So PW3 took Corporal Njagi's advice and locked the motorbike whose registration number he could not recall, in his canter vehicle. He did not state in his examination-in-chief that he took the motorbike to the police station. In cross-examination he said the neighbours - George Ithua and Isaac Mwangi - found the motorbike at Boda Petrol Station. In any event he carried the motorbike to his shop. He said the neighbours recognized it by its colour, its puncture and they followed it.

75. Despite having carried the motorbike in his canter to his shop, PW3 in cross-examination said neither he nor his two neighbours, George and Isaac knew the registration number of the motorcycle. Further he said the motorcycle was not dusted for fingerprints.

76. PW10, testifying about the motorcycle, said he was called on 10th May and told a motorcycle was parked at Dida Petrol Station and that it had been there the previous night. It was registration number KMCU 195P, Lion. The petrol station attendants told him that it had been parked there the previous day. He followed up and found it was owned by Martin Kirima Gathuo PW8, who had lent it to the 2nd Appellant who never returned it.

77. The contradiction in this evidence concern exactly where the motor cycle was found. It seems to have been at a petrol station: either Orida/Dida according to PW3 and PW10, or Tulaga Petrol Station according to information given to PW8 by his friend Mrefu.

78. Further, Mrefu told PW8 that the police were taking the motor bike as there was a case. However, PW3 testified that he took the motorbike kept it in his vehicle and carried it to his Agrovet shop, on the understanding with Corporal Njagi that he would come for it. No evidence was given concerning the handover of the motor bike.

79. Eventually, the motor-cycle was not produced as an exhibit, nor were Mrefu or any of the witnesses who allegedly spotted it after the robbery, called to testify. Thus there is a gap in the connection between the 2nd Appellant, the motorbike and its use, and it appears to stretch credulity to make a finding that the 2nd Appellant was involved in the robbery. Certainly, such involvement cannot be concluded, on a standard beyond reasonable doubt on the strength of the porous evidence availed. There is no onus in law for the defendant to prove anything concerning the motorbike

80. PW8 stated that he had known the 2nd Appellant since 2008, that they had done business together, were friends, and he even knew the 2nd Appellant's brother. He said that he knew him as Joseph Nganga. If they had such a close relationship that he could lend his friend his motorbike, it should have been easy enough for PW8 to give the police evidence from telephone data to show that the two had communicated on the night of the robbery when the accused allegedly borrowed the motorbike, or the following day when PW8 was calling the accused to return the motorbike.

81. With these issues not answered convincingly, I consider that a conviction on the strength of that evidence against the 2nd accused would be unsafe, and I so find.

82. On the issue of identification, the Appellants submitted that the prosecution had not proved that the Appellants had been properly identified or an identification parade done. In response, the DPP argued that neither identification nor recognition played any part in their prosecution, as none of the witnesses claimed to have identified or recognized any of the accused persons.

83. Having carefully perused the decision of the trial court, I do not see that there was any reliance on identification or recognition in this case. The night was dark and none of the witnesses claimed to have been able to identify or recognize their assailants. Instead, this was a case where the offence was committed by persons who left tell-tale signs having used guns that were discharged and their cartridges were matched to the guns that were found in possession of the accused

84. With the matching having been effectively done by a ballistics and firearms expert, the issue of recognition is a non-issue herein. The 1st Appellant having been found in constructive possession of the guns and ammunition in his hotel room, he was properly connected to the two offences of robbery and being in possession of a firearm without a firearms certificate.

85. On the issue of alibi and as to whether the defendant's defence was properly considered, I note that the trial magistrate considered the defences at page 5 of his judgment. He said of the 1st Appellant's defence:

“Clearly the accused persons defence is not tenable in the circumstances. He could not have been visiting the washroom at the time of his arrest as he claimed in his defence. There is overwhelming evidence showing he was inside Room No. 5 which was locked prior to the arrival of the police. These are three independent witnesses who confirmed he was arrested inside the said room.”

86. I see nothing to criticize concerning the trial court's assessment of the defence evidence, and that finding. As to the issue of alibi raised by the 1st Appellant on appeal, that again is a non-issue. The reason is that neither the 1st Appellant nor the 2nd Appellant offered an alibi as a defence. Both availed in their testimonies, as pointed out by the DPP, only evidence of what they did and where they were on the day or days after the material date of the offence.

87. It is trite law that the defence of alibi applies when a defendant asserts that on the date or time and place where and when an event was alleged to have occurred, he was not at the alleged location of its occurrence or at the time of its occurrence.

88. On the issue of the harshness of the sentence meted by the trial court, it was argued that the death sentence was declared unconstitutional by the Supreme Court decision of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR**. It was argued that Kenya is a democracy and the jurisprudence globally is that the death sentence is too cruel.

89. The correct appreciation of the **Muruatetu** case is that what it found unconstitutional was the invocation of the death sentence as a mandatory sentence where the trial court has not exercised its discretion in considering the mitigation of the accused prior to sentencing. The Supreme Court found that **Section 204** of the **Penal Code** was inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. In **Paragraph 69**, the Supreme Court held:

“Consequently, we find that Section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment.”

90. Further, in **Paragraph 59**, the Supreme Court stated:

“We now lay to rest the quagmire that has plagued the courts with regard to the mandatory nature of Section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the Penal Code, unfair thereby conflicting with Articles 25 (c), 28, 48 and 50 (1) and (2)(q) of the Constitution.”

91. I have perused the post-conviction proceedings and find that the 1st Appellant provided mitigation which the trial court considered and took into account, together with the probation officers report including the victims' views and the views of the community. He then sentenced the accused to the death sentence.

92. The **Muruatetu** case held that the Constitution *recognizes* the death sentence as *lawful*, but that it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed [Paragraphs 52 **Muruatetu**]. What **Muruatetu** rejected was the idea that a trial court should operate as if it has no discretion to impose a sentence other than the death sentence having taken into account the mitigating circumstances, as that may make the sentence wholly disproportionate to the accused's criminal culpability. The failure to individualise the circumstances of the offence or offender may result in the undesirable effect of 'over punishing' the convict.

93. Here, the Appellant did not demonstrate that the manner of the conduct of trial court's mitigation process was unlawful or improper or that the exercise of the trial magistrate's discretion was inappropriate or improper.

Conclusion and Disposition

94. In light of all the foregoing, I come to the following conclusions:-

- a) The 1st Appellant's appeal is dismissed and his conviction and sentence are duly upheld.
- b) The 2nd Appellant's conviction is unsafe and is hereby set aside. Accordingly the sentence cannot stand and the 2nd Appellant is hereby set at liberty unless otherwise unlawfully held.

Administrative directions

95. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

96. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

97. Orders accordingly.

DATED AND DELIVERED IN NAIVASHA BY TELECONFERENCE THIS 26TH DAY OF MAY, 2021.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Ms Maingi for the State
2. Mr. E. Ondieki for the 1st Appellant Joseph Njuguna Muhia
3. Joseph Njuguna Muhia - 1st Appellant at Naivasha Maximum Prison
- James Nganga Njokerio - 2nd Appellant in person at Naivasha Maximum Prison
4. Court Assistant – Quinter Ogutu