



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CRIMINAL APPEAL CASE NO. 21 OF 2018

DICKSON KAKUKO ALIAS KABOM.....APPELLANT

-VERSUS-

REPUBLICRESPONDENT

[An appeal from the original conviction and sentence of the Senior Principal Magistrate's Court at KABARNET Criminal Case No. 139 of 2017 delivered on the 21st day of March 2018 by Hon. S. TEMU, PM]

JUDGMENT

Introduction

1. The appellant who was jointly charged with another for the offence of robbery with violence contrary to 296(2) of the Penal Code, was on 21st March 2018 convicted and sentenced to life imprisonment, while his co-accused, who the court found to have been a minor, was sent for correction to a borstal institution for three years.
2. The appellant and his co-accused had been charged before the trial court as follows:

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296 (2) OF THE PENAL CODE

Particulars of the offence: 1. Dickson Kakuko Dungan 2. Amos Kipturu Kalakatet: On the 30th/31st of January 2017 at Kambi-Kilima in Marigat Town in Baringo South sub-County within Baringo County, jointly while armed with an offensive weapon namely a sharp object, robbed Victor Koech Kiprop of a motorcycle registration No. KMDX 923Z Boxer 100 red in colour valued at Ksh.92,500/-and at, or immediately before or during immediately after the time of the said robbery, killed the said Victor Koech Kiprop.”

3. The Prosecution called thirteen witnesses, its case being set up by the testimony of the Investigation officer PW13 as follows:

“The incident had taken place on night of 30 and 31 January 2017 a boda boda rider within Marigat in the name of Victor Koech was killed and his motorcycle was stolen. After a while the 2nd accused was arrested at Langas police station Eldoret over the incident. The said suspect had led us to arrest the 1st accused who had escaped to Tangulbei with the motorcycle.

The assistant chief Marigat had talked with the chief Tangulbei and the 1st accused was arrested in possession of the stolen Motorcycle together with its ignition keys. He had removed the number plates and hidden it. The motorcycle was number KMDZ 923Z. The motorcycle was red in colour Boxer in make.”

4. The appellant and his co-accused when placed on their defence gave sworn testimony without calling any witnesses.

Judgment of the trial court

5. The trial court after analysing the evidence before it found the appellant and his co-accused guilty by its Judgment dated 21st March 2018, in material parts as follows:

“Judgment

Upon hearing the entire suit the issue that arose for determination were:-

1. Whether the accused were the ones that had killed and stolen from the (deceased) Victor Koech Kiproh.
2. Whether the evidence of PW2 Caroline Kigen was corroborated by other witnesses to the extent that account can reach a conclusion that indeed it was the accused that committed the offence.
3. Whether the defence tendered, contradicted the evidence tendered by the prosecution to the extent that doubt was created to warrant an acquittal.

The 1st accused herein submitted that the witnesses herein that is PW9 and PW10 had lied that he was the one that had the keys to the stolen motor cycle and that the person knew allegedly removed it from his pockets that is one Losewanyang was never called as a witness and thus that issue was not properly addressed and he should be acquitted.

The said accused submitted further that he was not one that had led them to where the motor cycle was as stated by PW9 and PW10 and that the two had stated that he was the chief that had informed them where the motor cycle was thus the said evidence was contradicting.

The 1st accused submitted further that the two witnesses PW9 and PW10 had lied that they had torches which they had used to see when the keys were recovered from and that PW2 the officer who took the 1st accused from Tangulubei to Kabarnet had lied for that he had picked him on 3/2/2017 whereas he was produced in court on 2/2/2017.

The 1st accused states further that the motor cycle was recovered 2km from where he was as per PW 9's evidence thus it cannot be said that it was not recovered on him

The 2nd accused submitted that it was not true as stated by PW2 that he mentioned the 1st accused as Kabom as he had never seen him nor did he know him.

The prosecution did not submit as they had relied on the evidence on record with the evidence on record by the prosecution and the defences together with the submissions by the defence it was clear that:-

There was nobody that saw when the incident took place. It was PW2's evidence that led to the arrest and recovery of the stolen motor cycle two days after it was stolen from the deceased herein Victor Kipkoech.

I wish to state from the onset that the entire prosecution's case was founded on circumstantial evidence.

PW 2 had heard the 2nd accused tell his sister that he together with one Kabom the first accused herein had killed a person and the 1st had taken the deceased's motor cycle to Tangulubei.

PW 2 had taken the said information to Langas Police Station where it was confirmed that indeed a person had been killed at Marigat on the night of 30 and 31st January, 2017 and his motor cycle stolen.

PW 2 had rung the chief Marigat PW 5 on 1/2/2017 and she informed him that the person that had taken the motor cycle was Kabom and he had gone to Tangubei. PW 5 had followed up and indeed the motor cycle was recovered with the 2nd accused who is known by the name of Kabom at Tangulubei on 1/2/2017 when PW 10 herein confirmed to have found him with the said motor cycle at the centre and since word had reached the area that a person had been killed at Marigat and the 1st accused might have been involved. PW9 and PW10 among other people were assigned to trace the 1st accused who had been seen at the centre during the date with a motor cycle and they had arrested him at about 11pm of the same day 1/2/2017 and the keys for M/C were recovered from him and he led the group to where he had hidden the motor cycle and it was recovered and he was arrested and taken to Kabarnet police station on 2/2/2017.

The theft and killing was committed on 30 – 31 January night. The 2nd accused was heard narrating what had happened. On 31/1/2017 evening and he was arrested on 1/2/2017 and the 1st accused was arrested on the same day at 11 pm and motor cycle recovered and it was identified as the one that had been stolen from the deceased'.

The 1st accused stated that he was arrested due to a grudge with the people who arrested him over a girl whereas the 2nd accused had stated that he was framed up by PW 2 who as his girlfriend over a family dispute.

But as per the evidence tendered by PW 9 and PW 10, he 1st accused who was a resident of Tangulubei had gone to Marigat where he had a wife a fact which was so stated by PW 1 that indeed the 1st accused was at Marigat before the incident and he had a wife there and that the 1st accused had gone back to Tangulubei on the date he was seen with the motor cycle that is on 1/2/2017 one day after the theft.

PW10 stated that he had looked at the said motor cycle when the 1st accused had at the centre and he noted that the number plate was bent and when it was recovered and produced in court the said number plate was still bent.

PW9 and PW10 had followed the 1st accused to a Kwichatasi where he had gone with the motor cycle and key had met him in a house and they had recovered keys from his pocket. PW9 and PW10 confirmed that it was one Loswanyany in their presence and that they had torches when they arrested the accused and recovered the keys. That evidence was consistent in examination in chief and cross examination.

The 1st accused states that indeed he was arrested from Akwichatasi on 2/2/2017 by a group of people but they did not tell him as to why. That bit of defence did not contradict the evidence of PW9 and PW10. PW9 and PW10 stated that indeed the 1 and 2 accused were residents of Tangelbei and they were related thus the two accused's defence that they did not know each other was not true nor did it arise on cross examination of the prosecution's witnesses.

It was also clear from the evidence by PW9 and PW10 that the two accused were not at home when the incident took place but the 2nd accused stated that he was at Eldoret which evidence was discredited by PW2's evidence that the 2nd accused had gone to Eldoret on 31/1/2017 evening and that they had slept in the same room for the said date. If indeed the 2nd accused was in Eldoret from the date of incident 30/1/2017 to 31/1/2017 he could have stated so in cross examination of PW 2 wherein he only asked he as to why he had framed her for refusing to have sex with her on 31/1/2017 when they slept in the same room and the issue of girl friend did not arise too.

It was thus clear that the 1st accused had gone to Tangelbei after the incident on the morning of 31/1/2017 and he had reached there by 1/2/2017 where he was seen with the motor cycle which was later identified as the one that the deceased used to manage on behalf of PW6 herein.

It was also clear that the 2nd accused had gone to Eldoret on 31/1/2017 after the incident at Marigat where he had narrated the incident to his sister wherein PW2 who could hear and understand Pokot language had heard the entire episode and reported and that led to the recovery of the stolen motor cycle and arrest of the 1st accused who had ran with it to Tangelbei and the prosecution had proved that indeed the motor cycle was with the deceased before he was found dead and motor cycle was with the deceased before he was found dead and motor cycle missing.

I have considered the evidence tendered and observation made herein above together with decides case hereunder to arrive at my decision which I will state hereunder.

(1) Simon Musoka v R EA 717. Where it was heard in a case dependency.

“Exclusively upon circumstantial evidence he (the trial judge) must find before deciding upon conviction that the inculpatory facts were incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt”

That was also so stated in the cases of Okeno Vs R 1972 EA 32.

Peter Mole Odero & another v Republic 2011 eKLR.

I also considered the case of Oluoch vs R 1985 KLR which gave ingredients of the offence of robbery.

Having said the above and considered the decided cases am satisfied that the two accused persons were properly connected the crime wherein the victim was the motor cycle that he had been stolen and recovered from the 1st accused who was undoubtedly mentioned by the 2nd accused when he narrated the episode to her sister.

The theft had taken place on the night of 30-31 January, 2017 and the stolen motor cycle was recovered from the 1st accused on 2/2/2017 two days after the robbery at Tangelbei a distance that can take many hours to ride to from Marigat. I can thus safely make an inference that the 1st accused had travelled from the scene on 31/1/2017 and he had reached where he was found after one day. That was such a short period from the date of the theft and I can conclude that indeed the 2nd accused was involved in the incident. The evidence of PW 2 was beyond reasonable doubt credible and it connected the accused to the theft and the 1st accused was found in possession of the stolen motor cycle day after the theft which confirmed that indeed what prosecution has heard from the 2nd accused was true.

As per the documents evidence the victim was killed by a deep cut to his neck which meant that the accused were armed with weapons which were sharp. It was also clear that the accused were two when they committed the offence and indeed they had killed the victim before stealing the motor cycle that was recovered and positively identified by the owner PW 3 herein.

I had no doubt PW2's evidence and the said evidence was tested twice in cross examination and she appeared a truthful and courageous witness who went a great length to help unravel a crime without fear of the consequences.

PW 2's evidence led the prosecution to connect the two accused person with the incident and I find that the two accused had indeed committed offence which was rightfully termed as robbery with violence.

I thus find the accused guilty and convict them for the offence of robbery with violence contrary to section 296 (2) of the penal code as charged.

S. O. TEMU, PM”

Sentence by the trial court

6. In sentencing the appellant, the trial court imposed a sentence of life imprisonment for the robbery with violence as follows:

“MITIGATION

1st accused: I have children at home and I was the one taking care of them.

2nd accused: I did not commit the offence I urge the Court to consider me.

SENTENCE

I have considered the nature of the offence and fact that the two accused persons had all the victims neck before stealing his motor cycle.

That was clear demonstration that they had used excessive force than necessary if they wanted the motorcycle.

The act was inhuman as they two had cut the victim’s neck without any known resistance as there was no evidence that the victim had resisted when they attacked him.

The act calls for severe sentence.

I have noted that the 2nd accused’s is a minor aged 16 years as per the age assessment report dated 4/1/18 and thus he will not serve custodial sentence.

The sentence for the 2nd accused is deferred until we obtain a report from the children officer and children office.

He will be remanded at Kabarnet police station.

The 1st accused is sentenced to serve life imprisonment as the offence was serious and they had used excessive force to the extent that they took the deceased’s life who did not resist.

14 days right of appeal.

S.O.TEMU, PM”

The appeal

7. Being dissatisfied with the Judgment of the court, the appellant filed an appeal from both conviction and sentence as follows:

“AMENDED GROUNDS OF APPEAL

Being aggrieved and dissatisfied with the decision of the trial magistrate and perusal of the Court Proceedings and Judgment. I now wish to amend my grounds to conformity with Section 350 (2) (v) of the penal and rely on the following grounds:

THAT, the trial court Magistrate erred both in laws and facts by convicting the appellant on Prosecution case full of contradictions and was not proved beyond reasonable doubt thus unsafe conviction.

1. THAT, the trial Magistrate erred when failed to observe that the accused was not properly identified by prosecuting witnesses both at the scene of crime and in the court.

2. THAT, the recovered exhibits were not tracked nor finger prints dusted and found in the hands of accused red-handed as claimed.

3. THAT, the trial court fails by convicting the appellant without considering the investigation in this case in the instant was shoddy and conducted by unqualified personal and a rank of inspector.

4. THAT, my arrest was calculated and framed to implicate me over the offence by uncredible witnesses.

5. THAT, it was not granted fair trial as enshrined under Article 50 (2) (h) (g) 2010 Kenyan constitution the right to represented by counsel.

REASONS WHEREFORE: I pray that may my appeal allowed conviction quashed sentence set aside and set me free at my liberty.

DRAWN AND FILED BY: DICKSON KAKUKO DUNGEON Alias KABOM.”

Appellant’s submissions

8. The appellant further filed written submissions urging insufficiency of evidence to prove the charge as follows:

“WRITTEN SUBMISSIONS

My lordship, I was convicted for the offence of Robbery with violence c/sec 296 (2) of the Penal Code and sentence to life imprisonment. I appealed against both conviction and sentence based on eight grounds as follows:

GROUND ONE, TWO AND THREE

My lord, the trial Magistrate erred in laws and facts by convicting the accused person herein while relying on the evidence of circumstantial evidence. It appears that there is eye witness and further placed the exhibit in appellant hand which in real sense was not recovered in possession of the accused.

The trial Magistrate in his findings believed that the appellant was not seen taking the alleged motorcycle the alleged motorcycle nor injuring the victim. The trial court believed that since PW2 mentioned alias name of the 1st accused whom she does not know, the court ended up convicting the appellant.

Pw1 alluded his testimony and told the court that he is the father to the deceased. He said on that very morning of 31/01/2017, is the date he found his second born dead. He further stated that, he knew the 1st accused person as he married from their village. He fails on placing the accused person on the scene of incident as he was only told of the incident.

My lordship, after reading the Judgment of the trial court and evidence that there is no eye witness. The prosecution relied on a circumstantial evidence and what constitutes circumstantial evidence has been the subject of judicial consideration in several cases.

My lord, in the case of ABANGA Alias ONYANGO VERSUS REPUBLIC CRIMINAL APPEAL NO. 32 OF 1990 (UR): Where the learned Judges of Court of Appeal stated that:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence **must** satisfy three **tests**”:

- i. The circumstances from which an inferences of guilt is sought to be drawn, must be cogent and firmly established.
- ii. The circumstances should be of definite tendency unerringly pointing towards guilt of the accused person.
- iii. The circumstances taken cumulatively, should form a chain, so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused on and non else.

My lordship, in the evidence of Pw9, he was in the company of other people/persons while searching the appellant. This is found in Page 38 line 9 – 10 and I quote “we looked for him while in the company of Sukuta, Losiwanyang and Loturiareng and NGOTOR towards Akwichatis.

They were also in the company of Police Officers vide page 38 line 11 and I quote “We had started the search at 11.00 pm while in the company of Police Officers.” According to Pw9 the appellant was found sleeping in a hotel with other boys.”

My lordship the evidence of the alleged boys could be of great significant as it could have revealed what was or could have been found in possession of the appellant.

On page 38 line 14 as I quote: “We asked him, where was the motorcycle, he stated that he did not have it.” In reveal sense the exhibit was not in possession of the appellant.” This is revealed on Page 39 line 2 as I quote “We had left that place with the 1st accused on to one point where he had kept the motorcycle 2 kilometres away.” Contrary to Pw10 vide Page 45 line 5 as I quote “We had gone towards Nasorot road for about 1 km and he asked to enter into.”

My lordship, I wish to rely on the case of MWANGI VERSUS REPUBLIC 1957 EA 104 it is as follows: “When the exhibit is not found in the possession of an accused person then he is not liable for it.”

Pertaining to the third ground it is my considered opinion that the prosecution case was full of inconsistencies and contradictions. On vide page 38 line 15 – 16 as I quote Pw9 testified in the court “one Losiwanyang had removed the motorcycle keys from the 1st accused’s pockets” in cross-examination said as I quote on vide page 40 line 5.

“I am the one who had taken the keys from your pocket” as he keep on testifying on vide page 40 line 6 as I quote “I had seen when the keys was taken from your pockets” contradicting the earlier statement.

On the same not Pw10 state on vide page 45 line 1 – 2 as I quote “The boy by the name Losiwanyang had put his hand in Kabom’s pockets and he had removed the motorcycle keys “as in the other hand the said Losiwanyang never appeared in the court as witness to testify how he recovered the said keys from the accused pockets as Pw9 and Pw10 testified. My lord the three statements do not tally at all.

Elsewhere on page 39 line 1 – 2 Pw9 stated as I quote “we had left that place with the 1st accused onto a point where he had kept the motorcycle 2 kilometres away “ contrary to Pw10 vide page 45 line 5 as I quote “We had gone towards Nasorot road for about 1 kilometre and he asked to enter into.” My lord the two statements never meet because they said we were together as accused led them to where the motorcycle was, according to the testimony. My lord two kilometres and one kilometer are different distances.

Further contradictions are as follows:

On vide page 40 line 4 Pw9 on cross examination said and I quote. “We had torches which we had use to see you when we look the keys from you” Contrarily to Pw10 vide page 47 line 12 and I quote “I did not indicate on my statement that I had a torch when I arrested you.” My lord the two statements are contradictory.

Other contradictory allegations occur at page 48 line 15 as I quote “I had seen you with the motorcycle and I can confirm that by the number plate” My lord testifying without mentioning the registration number, the type, colour and make of the motorcycle.

On page 66 line 11 “I did not visit the scene.” My lord there was no report of visiting the scene of crime though others visited hence crucial information and evidence including finger print dusting was not gathered to authoritatively say that the appellant was indeed present at the scene in contact with the said exhibits. It is my submission that the numerous contradictions cited above be viewed as pointing to an ulterior motive.

The above answers given in cross-examination reveals mere lies and contradictions it also raise doubt on the recoveries of the motorcycle keys on page 41 line 7 “The motorcycle was found at a distance from where you were sleeping” this point and many others keep away the appellant from the place of recoveries.

Another doubt is raised vide page 41 line 3 – 4 as I quote. “We had come with the petrol as we had been informed that you left the motorcycle without the petrol”

My lord informed by who and I submit. Meaning my lord they knew where they kept their motorcycle.

GROUND FOUR, FIVE, SIX, SEVEN AND EIGHT

Pw9 further affirms the court that he had never seen the appellant riding before. This is viewed on vide page 41 line 13 “I had never seen you riding the motorcycle before.” This revelation contradicts his earlier statement as he alleged that he was told that, the appellant was seen riding a motorcycle. My lordship, I wish to rely on the case of DINKERRAI RAMKRSHNA PANDYA VERSUS REPUBLIC C.A APPEAL NO.106/1990 EACA 93. Where the court held as follows: “It is difficult to distinguish the truth from untruth and as who was telling the truth and who was telling lies, where evidence is contradicted” Also in the case of: RICHARD ASPELA – VERSUS – REPUBLIC C.A APPEAL NO. 45 OF 1981. The evidence of Pw10 almost goes on word by word as that one of Pw9. Thus full of discrepancies and contradictions.

My lord I further submit that the evidence given by Pw1, Pw2, Pw9 and Pw10 are dubious and not safe to be relied upon. Their testimonies are opposing each other and deserve to be disregarded. It is trite law that if evidence is contradicted either in chief or cross-examination it becomes unreliable. In case of the NDUN’GU KIMANI VERSUS REPUBLIC, NO 22 OF 1979 KLR, it was held that: “the witness is a criminal case upon whose evidence, it is proposed to rely should not create impression in the mind of the court that he is not a straight forward person or raise suspicion about his truthfulness or do something to indicate that he is a person or raise suspicion about his truthfulness or do something to indicate that he is a person of doubtful integrity and is an unreliable witness which makes it unsafe to accept his evidence”

My lordship, I am being convicted under circumstantial evidence relying on one of the tests of circumstantial evidence. The trial Magistrate erred in laws and facts, thus he only relied on one test. I wish to also rely on one of the tests of the same circumstantial evidence to disapprove the trial Magistrate’s decision. This test number three: which goes as follow: “The circumstantial taken cumulatively, should form a chain so complete.”

My lordship the chain was not complete as the recovery of the exhibits by witnesses is doubtful. My lord accused doubt whether the doctrines of recent possession applied herein that the accused was in the possession of the found exhibits as witnesses claimed. In the case of MAINA –VERSUS- REPUBLIC EA.CC APPEAL NO. 11 OF 2011(UR) This court stated that “where there is evidence that the accused person is found in actual possession or has shortly after robbery, soled one of the item stolen during the robbery he is deemed to be in recent possession of stolen items. Evidence of recent possession of stolen property alone is insufficient to found a conviction for the offence of robbery with violence.

My lord for the doctrine of recent possession to apply the following pre-requisites must be demonstrated.

- a. The property must have been with the suspect.
- b. The property must be identified positively as the property of the complainant.
- c. The property must be proved to have been stolen from the complainant.

See the case of: ANDEREA OMBONYO VERSUS REPUBLIC (1962) EA 542 AND THAT OF ARUM –VERSUS- REPUBLIC (2006) 2 EA 10 IN THE latter case. This stated that: before court can rely on doctrine of recent possession as a basis of conviction in criminal case, the possession must be positively proved, that there must be positive proof. First the property was found with the suspect, secondly the property is positively identified as the property of the complainant thirdly the property was recently stolen from the complainant. My lord the three ingredients must be demonstrated for the doctrine of recent possession to apply accused doubt because no property was found to be in possession of the accused in the light of the evidence. In conclusion the evidence tendered by the prosecution are damaged or full of suspicion, for one it does not point the appellant as the person who committed the offence. It is misapplication of facts to believe that the accused was involved. The evidence tendered my lord, on how the motorcycle was recovered is so doubtful and thus it does not warrant for conviction according to the trial Magistrate. My lord I pray that sentence upon accused is unconstitutional and may this honourable court to consider my appeal with the evidence tendered does not satisfy conviction.

REASON WHEREFORE: I pray that may my appeal submission be allowed conviction be quashed sentence set a side and set me free at my liberty.

DRAWN AND FILED BY: DICKSON KAKUKO DUNGEON Alias KABOM.”

DPP's submissions

9. The DPP opposed the appeal in submissions dated 18th June 2020 as follows:

“SUBMISSIONS FOR THE PROSECUTION

The appeal is opposed.

The appellant herein was convicted with the offence of Robbery of Violence contrary to section 296(2) of the Penal Code. He was sentenced to life imprisonment. The prosecution called a total of 13 witnesses while the accused gave sworn evidence and called no witnesses.

PW1 testified that he knew the deceased well; he was his second born son. He also knew the appellant as he was relatives with a lady who was well known to him. On 31/1/17, PW1's grandson had asked for money to buy a book and PW1 asked that he go to the deceased's house and ask him for the money. The child went and informed PW1 that he had not found the deceased but had found the door open and a person covered with a blanket. He then went to the deceased's house, met with members of the public and it is then that they discovered the deceased's body and saw blood all over the place. The post-mortem was conducted and the deceased laid to rest.

PW2 testified that she did not the 1st accused (appellant) and the deceased. It was her evidence that she knew the 2nd accused and he had gone to Eldoret on 31/1/17 at about 6pm and he had inquired from her and her sister whether they had seen his sister Mama Faith. PW2 confirmed that the said Mama Faith was their neighbour and that she had informed the 2nd accused that she had not gone back home and the 2nd accused had left and the said Mama Faith had gone home at 7pm and the 2nd accused has also gone to Mama faith's house where he met PW1 watching news.

PW2 informed the court further that the said Mama Faith had asked the 2nd accused why he had gone there and it is then that it emerged it was because they had killed one boy while in the company of one Kabom at Kambi Wakulima and they had taken a motor cycle from him. PW2 further stated that the said Mama Faith had asked the 2nd accused whether it was true and he had stated that it was Kabom that had killed the said boy and that the said Kabom had asked him to sharpen a knife which he asked and that he did not know where the motorcycle was. PW2 further heard Mama Faith asking where the Kshs. 20,000 he had promised her was from the said motorcycle.

The said mama Faith had asked the 2nd accused to leave for Nakuru where his father was and the 2nd accused had stated that on the date of the incident he had slept with the 1st accused (appellant) up to midnight when they went to the deceased's house and they had pushed the door open and they had flashed a torch at him but he did not see and the said Kabom who is the 1st accused had asked to hold the legs and the 1st accused (appellant) moved to the head and he had cut the deceased's neck and he had woken up and the 2nd accused had ran away when the 1st accused (appellant) had asked him to help him carry the body out of the house.

After hearing this story, PW2 left for her sister's house and later went back to Mama Faith's house who requested her not to tell anyone about what she had heard. PW2 slept and on the following day, she informed her sister-in- law who rang a friend who was in Marigat to inquire whether a person had been killed in that area. PW2 informed the area chief (PW5) about what she had heard and was advised to report to the police. She proceeded to Langas Police Station Eldoret where she reported and the police had liaised

with their colleagues at Marigat and they asked her to take them to where the said suspect was.

With the help of information from PW2, the 1st accused (appellant) was also arrested and PW2 was also informed that the motorcycle was recovered. To avoid anyone knowing that she had made a report to the police, she went and slept at Mama Faith's house. Mama Faith and the 2nd accused were communicating in Pokot language which PW2 was able to understand. During the hearing, PW2 was able to communicate with the accused persons during cross examination in Pokot language without waiting for Kiswahili translation.

On cross examination by the 1st accused on 6/9/17, PW2 stated that all that she had stated in court is what she had heard the 2nd accused telling his sister Mama Faith in her presence and that is why she had reported to the police. This was therefore not hearsay. This information is what led to the arrest of the appellant.

PW4, the medical officer confirmed that he examined the body. He confirmed that he had a deep cut on the neck and another cut on the left ear. He confirmed the cause of death to be asphyxia secondary to neck injury from a sharp object.

PW5 stated that he was the assistant chief Marigat Township and he knew the deceased as a boda boda rider. He stated that he had received a call from PW3 informing him about the deceased and that his body was at his house. The police were informed and when they went to deceased's house, they found his body and blood all over the house. PW5 also informed the court that he had received a call from PW2 who was in Eldoret at the time and she informed him of all that she had heard. PW5 confirmed that indeed someone had been killed and a motorcycle stolen.

PW6 informed the court that he knew the deceased as he they had had grown up together and he had given the deceased his motorcycle to work with it. He had later learned that he had been killed.

PW9 informed the court that he was a resident of Tangelbei and that he knew the 1st accused. On 1/2/2017 he had heard that a person had been killed at Marigat and there was information that the 1st accused (appellant) had been involved. They decided to look for him. He together with PW10 and others had started their search at 11 am while in the company of other officers and found the appellant asleep in a house at 1am. They asked him where the motorcycle was and he stated he did not have it. One of the boys named Losiwanyang had removed the motor cycle's keys from the appellant's pockets and he stated that the motor cycle was far. They then left with the appellant who led them to where the motor cycle was and the number plate as well which had been removed. They then took him to Tangelbei police station and the appellant was re-arrested.

On cross examination, PW9 confirmed that they recovered the motor cycle from the appellant and it was the appellant who had led them to where it was. He further stated it was PW10 who had ridden the motorcycle to the police station which PW10 confirmed.

PW10 informed the court that he was among the people who were searching for the appellant. When they found him, they were using torches and had tied him with a rope. He further confirmed that the appellant did not own a motor cycle and that he had been informed that the appellant had killed a person over the recovered motor cycle. He also confirmed that he was present when the motor cycle keys were being recovered. PW11, 12 and 13 were the officers involved in the case who informed the court about the steps they took to arrest, investigate and arraign the appellant to court.

The appellant has appealed against the conviction passed by the trial court.

The prosecution case was hinged on circumstantial evidence and especially the evidence of PW2. The evidence of PW2 was consistent and despite being extensively cross examined on two occasions, she stood her ground. Her testimony was also corroborated by different witnesses and further so because they was recovery of the stolen motor cycle which was recovered from the appellant. The trial court observed that PW2 '**appeared truthful and a courageous witness who went a great length to unravel a crime without fear of the consequences**'. Her testimony tested vis-a-vis the testimony of other prosecution witnesses provides a flow and helps the court connect the dots regarding the circumstances that led to the robbery and subsequent death of the complainant.

On the issue of circumstantial evidence, in the case of **SAWE –V- REP [2003] KLR 364** the Court of Appeal held.

In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.

Further in **ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR)** the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction. These are:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i)

the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

The above cases were both quoted in Republic v Michael Muriuki Munyuri [2014] eKLR attached herein.

In the present appeal, the circumstances of the case can only lead to the conclusion that the appellant was involved in the death of the complainant and thus the offence was proved beyond reasonable doubt.”

Issue for determination

10. In accordance with its duty as a first appellate court (see *Okeno v. R* (1972) EA 32), this court shall re-evaluate the evidence before the trial court to form its own conclusion as to the guilt or otherwise of the appellant, before considering the conclusions of the trial court. The issues raised on the appeal and submissions thereon are the proof of offences robbery with violence and the identification of the appellant as one of the assailants and the alleged recovery of the stolen item on the appellant.

The Evidence

11. The evidence before the trial court was as follows:

“PW1 DAVID KIPROS YATICH, the father of the deceased victim, a resident of Wakulima Marigat testified as follows:

“The deceased VICTOR KOECH KIPROP was my second born son. I know the 1st accused. He comes from Marigat and he is related to one lady in the name of Gladys who stays within our village kampi wakulima.

I do not know the 2nd accused.

On 31.1.17 at 6a.m I was at home and I went to wake up my grandson Alex Kiprop.

The said grandson wanted Kshs. 10/= to buy a book and I said that I did not have and I sent him to go to victor’s [deceased’s] house and ask for money.

The said child came back and he stated that he did not find victor nor the motor cycle.

He stated that he had seen the door open and there was a person covered outside with a blanket.

From my home to victors house it is about ½ kilometers.

I had decided to go and see what had happened. Mid way I met kibich coming to my home. He asked me to go with him.

When we reached at the gate to victor’s house we found many people there.

I realized that there was an issue and I had felt that there was something wrong.

The gate was open unlike other days.

I had found the chief there and other people.

I went to where there was a person covered with a blanket and open the blanket and I was able to realize that the person was my son and he had a cut wound on the neck.

There was blood there.

I went into the house and there was blood all over up to the bed.

There was a bed sheet and clothes on the bed.

Police officers came to the scene and the body was taken to Kabarnet County mortuary.

The postmortem was conducted on the body and Jackson my brother and his son had witnessed.

The deceased was 26 years old and he was boda boda rider.

The motor cycle was for one police officer by the name of korir.

The said motor cycle is outside.

The motor cycle registration Number KMDX 923Z is identified and marked as MFI P1.

The number plate which is separate is identified and marked as MFI P2.

CROSS EXAMINED BY 1ST ACCUSED

- I know you well.
- You are an in-law to Gladys and you have married a girl from that home in the name of chumba.
- You always come there.
- You had also come with the deceased home and he stated that you are Gladys in law.
- I have seen you ride on the deceased's motor cycle before
- I have never greeted you.
- I saw you taking food to the children's from Gladys shop and I had seen you ride the deceased's motor cycle.
- I had seen you again in the village on a Sunday.
- You are known in our village by other people.
- There was no marriage ceremony that you carried out when you married the girl from Gladys home as you had taken the girl from the school.

CROSS EXAMINED BY 2ND ACCUSED

- I do not know you.

Prosecutor- no re examination

PW2 CAROLINE KIGEN testified as follows:

I am a resident of Barwesa Geturwa.

I am just at home.

The deceased was not known to me.

I do not know the 1st accused.

I know the 2nd accused.

On 31.1.17 the 2nd accused came to Eldoret at about 6p.m and he inquired from me and my sister Hellen Komen whether we had seen his sister mama faith.

The said mama Faith is our neighbor, we stay in one plot.

I had informed the 2nd accused that her sister had gone to work in the morning but she had not come back.

The 2nd accused had left.

The said mama faith came back at about 7p.m and the 2nd accused had also come while I was in mama faith's house watching news, mama faith had asked the 2nd accused why he had come to Eldoret and the 2nd accused had stated that he had come to greet her.

The said mama faith had then informed the 2nd accused that she knew that whenever he visited he must have committed something.

The said mama faith had then rung her mother to ask her why the 2nd accused had left home.

The said mother stated that the 2nd accused had killed a boy while in company of one Kabom.

The said mother had stated that they had killed a boy at kambi wakulima and they had taken a motor cycle.

The said mama faith had asked Amos 2nd accused whether it was true he had killed a person and he stated that it was kabom that had killed the said boy.

The said Amos stated that he had been forced to sharpen a knife the whole day by kabom.

The said mama faith had asked him why he did not ran away as he was a young boy.

The said mama faith informed Amos 2nd accused that a deceased person's blood will not go unanswered.

She asked him where the motor cycle was and he stated that he did not know.

Mama faith asked the 2nd accused whether the money he had promised her kshs. 10,000/= was for the motor cycle.

The said mama faith informed the 2nd accused to leave her house for Nakuru where his father stayed and he should wait for his mother to give him fare.

The 2nd accused had stated that they had slept upto mid night when Kabom woke him and they had gone to the deceased's house and they had entered into the house and when they entered inside they had found the deceased asleep and they had flashed a torch at him but he could not see and Kabom had informed him to stay at the legs and Kabom went to the head and Kabom had cut the deceased's neck and he had woken up and the 2nd accused had ran away when Kabom asked him to help him carry the deceased's body out.

The 2nd accused stated further that the deceased was their friend and they used to sleep in his house.

I had gone to my sister's house and I had taken supper and I went back to mama faith to sleep. Mama faith had asked me not to tell anybody as to what I had heard.

I slept and the following day I had informed my sister and in-law.

I had then rung my friend who is in Marigat in the name of Janet and I asked her whether there was any incident about killing at Marigat and she stated that it was true.

I asked the said Janet to go and report at the police station but she stated that she was afraid and she had given me the chief's mobile number and I had informed the said chief one Titus about the incident and he asked me to go to the police station and report.

I went to Langas police station and I had reported the incident.

The said officers had then talked with officers from Marigat police station. The officers asked me to take them to where the boy was and we went home but the boy had gone.

The officers had left and asked me to call them if he came back home.

At the evening I had rung the police officers and I informed them that the boy had come back.

The officers asked me to go to the police station and I show them where the boy was.

I went to the station and we went to the house and the 2nd accused was found in the house with his sister and he was arrested.

The 2nd accused's sister had come to my house and she stated that Amos had been arrested and she asked me whether I was the one who had informed the police and I stated that I had not.

The sister had rung some person at Tangobei and she informed him that Amos had been arrested by about 20 officers and she did not know as to why.

She had asked the said person whether Kabom was at Tangulbei and she was informed that he was there.

She asked whether he had a motor bike and she was informed that she had and he was selling it at Kshs.30,000/=.

Mama faith stated that I was the one who had sold her brother and that she was to go to the police station and if she was to be informed that it was over the same issue she was to know that I was the one.

I went out and I rung Titus chief and I informed him the motor cycle was with one boy in the name of Kabom and it was at Tangulbei.

The said Titus stated that he was to report and take action.

I had taken supper and I went to mama faith's house to sleep so that she should not suspect that I was the one who had

informed the police officer.

I had gone to Marigat police station and I had recorded my statement.

Mama Faith was talking with Amos in Pokot and Kiswahili.

I understand Pokot language.

2nd accused is identified in court.

CROSS EXAMINED BY 1ST ACCUSED

- I have nothing to ask.

CROSS EXAMINED BY 2ND ACCUSED

- You stated that you were forced to sharpen the knife from the morning to evening.

[**Court-** the court notices that the witness can understand pokot language as she can understand the 2nd accused's questions and answer them before interpretation.]

- I had heard you saying what you had done.
- I had inquired of what you stated and it came out that there was a person that had been killed and kabom was also found at Tangelbei where you stated and he had the said motor cycle.
- I had slept in your sister's house in the seat and you had also slept in the seat in the same room.
- I did not request you to have sex with you as you are stating.
- You did not refuse to have sex with me because I did not request for it.
- I did not want to tell my sister what I had heard on the same night before I could ascertain.
- I did not go to the police station that night because I did not know the police station and it was late.
- I had slept in the same room after I had heard what you had stated because I wanted to know more and I used to sleep in that room before and there was no reason why I had to leave that home.
- I had heard you saying what I have stated in court and it was followed at it turned out to be true.

RE EXAMINATION

- I did not want to raise any suspicion at night and that is why I did not say anything that night to anybody.

PW2 was at the request of the 2nd accused recalled for further cross-examination and she testified as follows:

CROSS EXAMINATION BY 1ST ACCUSED

All that I stated was what Amos was taking her sister in my presence.

That is why I went to the police station to report.

The accused had mentioned Kabom.

I did not know the said Kabom.

CROSS EXAMINATION BY 2ND ACCUSED

I stated before court all that you said in my presence. I stated all that you said at Eldoret in your sister's house.

Your sister had heard and her children. I did not state that it was mama Faith who informed me what you had done. All that I said is what I heard from you.

Mama Faith is not before court as she is your sister. I was annoyed with what you said.

I slept in the same house where you slept on that night on the chair. You had also slept on the chair.

You stated that you had ran away from your home after the incident and it was your mother who had given you fare.

You had informed your sister that it was Kabom that had asked you to sharpen the knife which you used to cut the deceased.

I had informed my sister what I had heard from you and she had taken me to the police station where I had reported.

All you said that Kabom the 1st accused was the one who went with the motor cycle was true as the said motor cycle was recovered with him.

The 1st accused is known in Marigat and at home as Kabom and when you mentioned that name he was arrested and recovered with the motor cycle.

I did not record the incident as you stated at your sister's home.

We did not watch news together. You stated that the incident was likely to be put on the news.

I did not see that news. I moved from Eldoret because your sister wanted to cut me.

You had informed the entire incident to your sister.

PW3 MARTHA CHEBII the assistant chief of Perkerra sub location testified as follows:

I used know victor the deceased herein as he was resident of my sub location.

I do not know the 2nd accused person who are before court.

On 31.1.17 I was at home in the morning at 8a.m when I received a call from one Samuel kiptoo who is village elder of Tambur village.

He had rung and he informed me that he had seen a person lying outside the home where the deceased victor used to stay.

I asked him who was staying there and he stated that it was Tarban who was boda boda rider nicknamed Tarban.

I went there on boda boda and I saw a person lying outside the house covered in blanket and there was blood all over the place.

I did not open the blanket.

I had opened the door to the house and I saw blood flowing from the bed into the house outside.

I went round the back of the house to see whether the motor cycle was there but there was not I had then gone to Marigat police station where I had reported the incident and I went back to the scene with CID officers who opened the blanket and I confirmed that it was victor's body and it had a cut on the neck.

The deceased's house was one made of iron sheet and it had a timber door but it had no lock.

CROSS EXAMINED BY 1ST ACCUSED

- No question.

CROSS EXAMINED BY 2ND ACCUSED

- I have no questions.

PW4 Doctor Sargo Kennedy, the medical officer at Baringo county hospital testified as follows:

I have been a medical officer for three years now.

I had filled post-mortem report on 6.2.17 for one Victor Kipkoech Kiprop.

I had conducted the post-mortem which was requested by CID Officers Marigat at 10a.m on 6.2.17.

The body had no clothes.

It was for male adult well build.

The body had changes and it had rigidity.

On external observation, the body was pale.

The body had deep cut about 16 cm long with sharp edges on the neck.

The cut was crossing the midline.

The trachea was cut and the tract muscles of the neck were cut.

There was superficial cut on the cheek extending from the mouth to the left ear.

Internally the respiratory system was full of blood in the trachea and bronchi.

The cardiovascular system was normal.

Digestive system was normal.

Genital system was normal.

The head was normal.

The nerves system was normal.

The Spinal Colum and code were normal.

The cause of death was asphyxia secondary to neck injury with a sharp object.

I wish to produce the report as an exhibit the report is produced as exhibit p3.

CROSS EXAMINED BY 1ST ACCUSED

- As per the examination the deceased's throat was cut by another person.
- It was not possible to know the person who killed the deceased by the deceased's eye.

CROSS EXAMINED BY 2ND ACCUSED

Accused- I have no questions.

RE EXAMINATION

- As per the neck injury it was not possible for one to cut himself.
- One could not cut himself that deep.
- If the injury was self-inflicted it could be to other parts of the body and not the neck by cutting.

PW5 TITUS KATILAT the assistant chief of Marigat Township testified as follows:

I knew Victor Kipkoech he was boda boda rider. I do not know the 1st accused herein.

The 2nd accused is not known to me.

I have seen them in court today.

On 31.1.17 I was at home when I received a call from the assistant chief Martha Chebii who informed me that she had received a report that the deceased had been killed she was lying outside his house at Kengela village.

I went to Marigat police station and I found that a report had been made there and they were willing to go to the scene.

I had gone to the scene while in the company of the police.

We had found many people at the scene and there was one person lying down on his stomach and he was covered with a sheet.

The police turned the person's body and we found that it was Koech [Taliban]

This body was blood all over and the police took the body to the mortuary.

We then commenced investigations.

On 1.2.17 I received a call at 7a.m and I recorded it and one lady informed me that she was in Eldoret and that at the place where she was staying she had heard her neighbors talking that there was a person that had been killed and the killer was in the said house.

The lady introduced herself as Caroline.

I asked her where she got my number and she stated that she used to stay in Marigat and she had my number.

I informed her that it was true one person had been killed and motor cycle stolen.

She stated that one killer was in Eldoret and one had ran away with the motor cycle.

I asked her to keep quiet as I informed the police.

I had made a report at Marigat police station and investigations continued.

CROSS EXAMINED BY 1ST ACCUSED

- I had gone to the scene with police officers.
- There was no sign as to who had killed the person but his neck had been cut.
- All that I have stated is what I was informed and I informed the police.

CROSS EXAMINED BY 2ND ACCUSED

- Caroline had heard the neighbor talking with his brother but I do not know the two.
- I only reported that to the police.
- I did not see you kill the deceased.

Prosecutor- no re-examination.

PW6 ARNORLD KORIR CHEBII a resident of Marigat testified:

I am army officer. The deceased was known to me as we had grown up together.

I do not know the 1st accused.

I do not know the 2nd accused.

On the night of 31.1.17 I received a call from my brother who informed me that the deceased had been killed by cutting his neck.

I was at the office then and I went to marigat to see what had happened.

The motor cycle that the deceased used to ride was mine and I had thus gone to condole the deceased's family.

I was informed that one suspect had been arrested at Eldoret.

After three days I was informed that motor cycle registration number KMDX 923Z had been recovered.

I have the receipt for the motor cycle.

I had gone to marigat police station and confirmed that indeed the motor cycle that had been recovered was my stolen motor cycle.

I was asked to record statements and I did so. I had purchased the motor cycle at kshs.92,500/=.

The receipt dated 13.10.15 is marked as MFI P4.

CROSS EXAMINED BY 1ST ACCUSED

- The police officers are the one who had informed me that the motor cycle had been recovered.
- I do not know whether the officers are witnesses.

CROSS EXAMINED BY 2ND ACCUSED POKOT AND ENGLISH

- I do not know the people who attacked the motor cycle rider.
- I do not know the people who stole the motor cycle.

RE EXAMINATION

- The motor cycle that was stolen and recovered is the one in court
- Motor cycle is identified in court. MFI P1.

PW7 Jackson Sergor Yatich a resident of Marigat testified:

I work with KDF.

I deceased Victor was my brother's son.

I don't know the 1st accused nor the 2nd accused.

On 31/1/17 I was at home at 5 marigat when I received a call from David Yatich who informed that something had happened and that his son Victor had been killed and his neck had been cut.

I left my home and I went to his home.

I had found that my mother had gone to see the deceased's body.

I also went to the scene and I saw the body and I confirmed that it was the deceased's body and the motor cycle that he used to use was not there.

I went to Marigat police station where I found the chief and he had reported.

We went back to the scene with the police and we took the body to the mortuary at Kabarnet hospital.

When post mortem was conducted I had gone to the hospital and I had witnessed.

The body was released and we had taken it home for burial.

I did not know the person that had killed the deceased but one was arrested at Eldoret and one at Loruk Tangulbei

That is all

CROSS EXAMINATION By 1st Accused

- My name is Jackson Sergon Yatich
- I recorded my statements

CROSS EXAMINATION By 2nd Accused

- I have no questions

Prosecutor – No Re-Examination

PW8 number 93513 P.C Walles Otieno of Langas Police Station testified as follows:

On 1/2/17 at 9.am I received a call from the deputy OCS one inspector Kisor of Langas Police station.

He instructed me to go to his office.

He informed me that there was one person who had requested that there was on suspect on murder who was within Eldoret Township.

I went with P.C Rashid and P.C Koech P.C Wako and P.C Mutemi to Eldoret town and we had searched for the suspect but we did not find him.

I went back to the station and I reported

The informer was asked to be on the watch out for the suspect.

On the second date I received a call from inspector Kibor who informed me that the informer was at the station and she had stated that she had seen the suspect at her sister's house at Mwanzo.

I went to Mwanzo estate while in the company of P.C Githinji, P.C Wako, CPL Kavera, and Inspector Giri and Inspector Kibor.

On arrival at Mwanzo we were shown the house and the informer had described the suspect's appearance and we had entered into one house where we found one lady who was in company of one man who fitted the description I had been given.

I had introduced myself and I had interrogated the man and I had arrested him and we escorted him to Langas Police Station and officers from Marigat Police station had picked him the following day.

The 2nd accused who is before court is the one I had arrested. 2nd accused is identified in court.

CROSS EXAMINATION BY 1ST ACCUSED

I don't know you

I am not the investigating officer.

CROSS EXAMINATION BY 2ND ACCUSED

I am not accused to allowed to disclose the informer.

The informer had stated there was murder at Marigat and the suspect was at Langas.

I don't know whether you were at Marigat when the incident had taken place.

We did not recover any item which was used in the committing the offence.

Prosecutor- No Re-examination

PW9 Lochau Kirapu Kapcherip resident of tangulbei testified as follows:

I am resident of Tangulbei.

I work with N.Y.S. at Tangulbei.

I know the first accused who is before court.

He is called Kabom.

He is my brother from home.

The 2nd accused is my neighbor.

On 1/2/17 I was at home at Tangulbei when we heard that a person had been killed at Marigat.

There was information that it was the 1st accused that had been involved.

We had then decided to look for the accused as we were not happy with that.

We looked for him while in the company of Sukuta Losiwanyang and Loturiareng and Ngrotor towards Akwicalisi:

We had started the search at 11 pm while in the company of Police Officers and we reached there at 1 a.m.

We had found the 1st accused asleep at one hotel together with other boys.

We asked him where the motorcycle he stated that he did not have it.

One Losiwanyang had removed the motor cycle keys from the 1st accused's pockets.

He had stated that the motor cycle was far.

We had left that place with the 1st accused on to one point where he had kept the motor cycle 2 Km away.

When we reached on point in the forest the 1st accused had pointed to where the Motor Cycle was.

The motor cycle had no number plate and we asked him as to where it was and he had taken us to one point where he removed the number plate.

The number plate MFI P2 is identified in court.

We had left that point to Tangulbei Police Station at about 5 am.

Police Officers had come there and they picked the 1st accused the keys is identified and marked as MFP4.

The motor cycle is MFI P1 is identified in court.

CROSS EXAMINATION BY 1ST ACCUSED.

I don't have the N.Y.S.I.D card.

I am casual worker with N.Y.S.

I had heard the matter from other members of the public. Those people who were talking are alive. One was Lotingole. He is not a witness in this case.

I have stated what was found with you.

We had found the motor cycle that was involved in the incident with you.

We had arrested you at 1 am.

We had come at night because we were informed that you were at Kwichatisi.

We had torches which we had used to see you when we look the keys from you.

I am the one who had taken the keys from your pockets.

I had seen when they keys was taken from your pockets.

We had come to arrest you because you were in the forest and the chief had asked us to look for you.

Mr. Cherutich the officer in-charge Tangulbei had asked us to come and look for you.

Not many people could come to where you had gone to hide.

There is a chief at Kwichatis and he was the one who informed us that you were there.

There chief had stated that you were at that area with a motor cycle.

We had taken you together with the motor cycle when we arrested you.

We had informed the boys that were with you and Materi that we had recovered the motor cycle from you.

They said people can be witnesses if they are summoned.

I don't know how to ride motor cycle.

Sukuta was the one who had driven the motor cycle.

We had come with the petrol as we had been informed that you had left the motor cycle without the petrol.

I had no camera to take on the motor cycle that we recovered.

We had received a call that you had left the motor cycle without petrol.

The motor cycle was found at a distance from where you were sleeping.

You had informed a Keno's brother that you had left the motor cycle without petrol.

I kept my items at home.

We had found the motor cycle at the forest.

You never used to have a motor bike and you had later come with motor bike.

I had never seen you riding a motor cycle before.

It is not true that I know how to ride a motor cycle. You don't stay at Tangelbei always.

You sometimes stay at Marigat.

I have heard that.

I am telling the truth.

We are not framing you.

I did not indicate that you are stock/ animal thief.

You are the one that led us to where the motor cycle was and the number plate.

CROSS EXAMINATION BY 2ND ACCUSED ENGLISH AND POKOT.

I know you as Chedemo and you are from Tangelbei.

I don't know you as a bad man.

RE-EXAMINATION

The motor cycle keys were recovered from Kabom 1st accused's pockets. It was the 1st accused that led us to where the keys were.

PW10 Nadumo Meshack Suguta resident of Tangelbei testified:

I am boda boda rider at Tangelbei.

I know the two Accused persons.

1st accused is Kabom and the second accused is Chedom.

The 1st accused is from my family.

The 2nd accused is resident of Tangelbei.

On a Wednesday I had woken up and went to Tangelbei at one centre by the name of Kimpo.

I had met may boys gathering to see Kasin's motor cycle.

The said Kasin 1st accused stays at Marigat where he has a wife but that time he came home.

I had looked at the number plate and I had realized that it was bent.

I asked him as to who the owner was and he stated that it was from his mother in- law.

Kabom was outside Dominic's shop.

The said Dominic had informed me that Kabom had stated that he had killed a person over the said motor cycle.

I stayed at Tangulbei for a while and I carried one male by the name Meshack Kavatoto area.

When we reached Kevatoto I had met Kabom carrying one man and they were drinking changaa as they went on.

Kabom had mud on his motor cycle when we reached their said man had asked me to move on as he wanted to go.

On the way the said Meshack had informed me that he was from Mogotio and he had heard that a person had been killed and his motor cycle stolen and he suspected it was the one as Kabom had no motor cycle.

I had dropped the said man and as I left Kevatoto I had met Kabom 1st accused and I went on.

I had reached Tangulbei at about 1 pm and I had heard people.

Saying that Kabom had killed a person. The assistant Chief one James Lukinyang had stated that he wanted Kabom but he had left.

That evening the said Chief stated that the police were to follow Kabom but it was agreed that the area youths should look for him.

It was showed to the area Chief's office Kiragu, Lochau Losiwanyang, Kokun Lotioko and Ngirutul Lotioko and we were informed that Kabom had gone to Kwichatis and we were required to follow him and arrest him.

At about 11 pm we had gone to Kwichatis and were shown the house where Kabom was.

We had kicked the door open and we found many other boys there.

When we entered we had tied Kabom's hands with a rope.

We asked him where the motor cycle was and he stated that he did not have it. The boy by the name of Losiwanyang had put his hand in Kabom's Pockets and he had removed the motor cycle keys.

We had asked him to go and point on where the motor cycle was. The said Kabom had sat in Kikon's motor cycle and Kiragu had sat behind.

We had gone towards Nasorot road for about 1 km and he asked to enter into the rough road and after a while he asked us to alight and he pointed out to us where the motor cycle was.

We had found the motor cycle and we had realised that it did not have the number plate.

We had put petrol in the motor cycle as it did not have any and we had carried some as the place was far. We had asked the 1st accused where the number plate was and he had led us to some places where there was some soil that had been dug by Ant eater and we searched for the number place and the 1st accused had picked it from where it was and we went to Tangulbei and we reached there at about 5.am.

We had gone with the said motor cycle to Tangulbei and we left it with the police.

We had torches when we arrested the 1st accused.

CROSS EXAMINATION BY 1ST ACCUSED.

I had seen you 2/2/17 when we had met at pompo at Dominic's shop.

I had met boys taking about your motor cycle.

Dominic had informed me in low torn that you had killed a boda boda rider.

I was afraid when I had heard that and I had left.

I had arrested you as a member of the public for the act you had committed.

When I left Kivatoto the Chief had asked me whether I had seen you. I did not indicate that Dominic had informed me that you had killed a person.

I did not indicate on the statement that you had informed me that the motor cycle belongs to your mother in-law.

You never asked to have a motor cycle at the area before the date of incident.

I had gone on with my business when Dominic had informed me that you had killed a person.

I am in event to confirm that I had found you with the motor cycle which is before court. I did not photograph the motor cycle.

When I went back to Tangelbei I had found that everybody was talking about your action.

I did not see you kill the person. I had found you with a motor cycle and I had talked with you and I had asked you why the number plate was bent Dominic had also seen you with the motor cycle at Tangelbei.

You are trying to run away from the truth.

The number plate was bent as it is when I talked with you at Tangelbei.

I am in court to confirm to you that I had talked with you. We arrested you at 1.am. And we went to where you had kept the motor cycle and we took you to the police.

I was not armed when we came to arrest you.

We had pushed the door open and we had arrested you when you had stood up.

I did not indicate on my statement that I had a torch when I arrested you.

Losiwanyang is the one who took the keys from your pockets. He is not a witness before this court. I am telling what I saw. I was there when the keys were taken from your pockets.

You had taken us to where you had kept the motor cycle.

We had carried petrol from Tangelbei as we came to look for you. From Tangelbei to Kwichatis is far and that was why we had carried fuel.

You had informed Timothy that the petrol had been finished in the motor cycle that you had and you had warned him against telling any person or else you were to deal with him.

Timothy is the one who pointed to us where you were and we had found you there and you had the motor cycle keys with you and you had led us to where the motor cycle was and where the number plate were.

I am the one that had driven the motor cycle from where it was to Tangelbei.

We were sent by the government officers to come and look for you.

We had taken the stolen property to where the government officers were you will be lying if say that we are the one who had committed the offence.

Any member of public can arrest a suspect when the police are far. You used to stay at Marigat before you came with motor cycle to Tangelbei.

The information about the killing had reached Tangelbei when you came there.

I did not see you kill the motor cycle rider.

I had seen you with the motor cycle and I can confirm that by the number plate.

I did not indicate on my statements that you are a thief.

CROSS EXAMINATION BY 2ND ACCUSED

You belong to Tangelbei but I don't know where you moved to later we had heard that it was two people that had committed an offence in Marigat.

I did not find you with the motor cycle. I don't know anything to do with this case and you.

Prosecution- No Re- examination.

PW11 No. 106528 P.C Denis Imbuko testified as follows:

I am attached to DCIO Marigat.

On 31/1/17 I was at the station at 7am when I found the OCS Marigat charting with some people.

The OCS had informed me that one boda boda rider in the name of Vincent Koech alias Talisan had been killed at Kampi Kulima.

I received a call from my in charge Chief inspector Makaa who asked me to join the OCS in the scene visit.

The said DCIO had come to the station and we had entered into the G.K. Motor vehicle while in the company of the OCS DCIO and two other officers and we went to the scene. When we reached the scene we had found many people and there was a body that was covered with blanket and there was blood spilling to the house.

We removed the blanket and we had established that it was Koech's body that was covered as I knew him and used to carry me.

I had put on gloves and I had realized that the deceased's neck was cut deeply and the cheek had a cut.

We had taken photographs on the body and we took the body to Kabarnet County Mortuary.

The blood was spilling into the deceased's house and when we entered inside there was blood in the floor.

Later the 1st accused was arrested by other officers and I had found him in Kabarnet.

The 2nd accused was arrested by one and other officers from Langas Police station where he had been arrested.

CROSS EXAMINATION BY 1ST ACCUSED- Kiswahili and English.

I had indicated on my statements on how I had visited the scene and how I had arrested the accused.

I was among the persons that visited the scene. I know you as sergeant in this case but I don't know your character.

I came to know you because of this case.

There were many members of the public at the scene.

The members of the public did not know as to who had killed the deceased we did not find the weapon that had been used at the scene.

CROSS EXAMINATION BY 2ND ACCUSED

I had found you at Langas Police Station and booked for the offence of a killing that had taken place in Marigat.

I had found you at the police cells.

PW12 number is 99018676 Sergeant George Ngigi of RDU Mukutani area testified as follows:

On 3/2/17 at about 7 am. I was at Mukutani when I was informed by senior to go to Tangelbei with the G.K Motor vehicle as advised and pick on suspect and take him to Kabarnet.

I was with other officers to Tangelbei.

When we reached the D.O's office we had found on suspect who was handcuffed.

CPL Micah had handed me the suspect and a motorbike.

I took the said suspect together with the motorcycle to Kabarnet police station.

The motor cycle is identified in court.

The number plate had been removed. I was given the said number plate KMDX 923 Z.

The same number plate is identified in court.

The suspect that I had arrested is the 1st accused.

1st accused is identified in court.

CROSS EXAMINATION BY 1ST ACCUSED.

I had arrested you on 3rd February 2017. That is the date I had taken you to Kabarnet.

You were in the office handcuffed and the motorcycle was outside the office.

I don't know where the motorcycle had been found.

CROSS EXAMINATION BY 2ND ACCUSED

I don't know you.

I don't know anything to do with this case and you.

PW13 number 50917 P.C Zebediah Wawire testified as follows:

I am attached to CID office at Marigat

I am the investigating officer in this case.

On 1/2/17 I was assigned to investigate a case which involves murder.

I was with Dennis my colleague.

The incident had taken place on night of 30 and 31 January 2017 a boda boda rider within Marigat in the name of Victor Koech was killed and his motorcycle was stolen.

After a while the 2nd accused was arrested at Langas police station Eldoret over the incident.

The said suspect had led us to arrest the 1st accused who had escaped to Tangulbei with the motorcycle.

The assistant chief Marigat had talked with the chief Tangulbei and the 1st accused was arrested in possession of the stolen Motorcycle together with its ignition keys.

He had removed the number plates and hidden it.

The motorcycle was number KMDZ 923Z. The motorcycle was red in colour Boxer in make.

The 2nd accused was taken to Langas police station and we were informed and we picked him.

We had investigated the case and we had charged the two.

The said motor cycle is before court.

I wish to produce it as an exhibit.

The motorcycle is produced as exhibit P1.

I was issued with the purchase receipt.

The receipt dated 31/10.16 is produced as exhibit p5.

I wish to produce the number plate as an exhibit.

The same is produced as exhibit p2.

The keys are produced as exhibit P4.

CROSS EXAMINED BY 1ST ACCUSED

I have given my evidence as per the investigation.

I was with my colleague Denis Imboko who has testified.

I indicated that in the police file.

I was the led investigator.

I have stated what I investigated. I did not see the incident take place.

You had escaped to another area with the motorcycle. You in Marigat on the date of incident but you were found in another area later with the motorcycle.

There are people who saw you at Marigat.

I started investigating at Marigat and recorded a report from one lady who had heard the 2nd accused talking with his sister about the incident.

I did not come to your home.

There are witnesses who recovered the motorcycle from you.

It was not necessary to come to your home.

I did not visit the scene.

Photographs were not taken on you and the motorcycle.

You were arrested while in possession of the motorcycle.

The witnesses who found you with the motorcycle have testified in court.

I am not the one who retrieved the keys from you. The witnesses who recovered the keys testified in court.

I am not informed that most thugs are police officer.

You were not arrested by police officers.

The people who arrested you stated that you had keys. I did not arrest you.

CROSS EXAMINED BY 2ND ACCUSED

You had escaped to Eldoret and that was where you were arrested from.

The motorcycle which is before court was recovered from Tangelbei from the 1st accused you were not found with any stolen property.

There was a witness Caroline Kigen who connected you with this case.

Mama Faith is not a witness as she is your sister.

The witnesses testified that you had committed the offence and she had informed us and you were not arrested.

I was not there when the witness heard.”

The Defence

12. When put on their defence, the appellant and his co-accused gave sworn testimony as follows:

“**DW1** My name is Dickson Kakuko.

I am resident of Kwichatis.

I am not working.

The charges are not true.

On 2/2/17on Thursday I was at Akwichatis upon the night.

I had slept upto 1 am when people came into my house by kicking the door open.

I asked them what it was and they had assaulted me.

I asked them what it was but they did not tell me and they said I was to know later.

I was taken to Tangelbei police station.

I had not been informed as to why.

I was informed that I was to know why I was arrested later.

A G.K motor vehicle had come and I was taken to Kabarnet police station where I was interrogated and I was bought to court.

I was not able to know or identify the people who had attacked me as I was arrested at night.

The charges were read to me and I pleaded not guilty and today I wish to state that I am innocent and I don't know the said offence.

That is all.

CROSS EXAMINED BY PROSECUTION

I know I am in court. It is because of frame up.

I never used to know Victor and I had never seen him. I don't know anything with this case.

2ND ACCUSED'S SWORN STATEMENT

DW2 My name is Amos Kipturu Katalat.

I am resident of Tangelbei and I was working at Eldoret as hawker.

The charges are not true.

I had difference with PW2 who was my girlfriend.

She had met me with another girl and she started to quarrel and I had chased her and she had gone she stated that I was to know her.

After a while police officers had come and they had arrested me.

When I asked as to what I had done they stated that I was to know later.

I was brought to Kabarnet court and I pleaded not guilty and even today I will say it is not true.

PW2 stated that I had informed mama faith about the issue but they did not bring her brother and sister to court.

I did not commit the said offence.

That is all I have to say.

Cross examination

I was arrested at Langas.

I was staying at house in Langas.

I had seen PW2 after we had differed for one month.

I have no sister at Langas.”

Determination

Preliminary

13. At the outset, having read the proceedings of the trial court on an application by the appellant to start the trial de novo on the grounds that he had not been supplied with witness states, I am satisfied that the complaint had no merit as obvious from the record set out in full below:

“9/1/18

Coram Before S.O.Temu, (P.M)

Prosecutor -Ms Macharia

Court Clerk – Lokwete

Interpretation – English/Kiswahili

Accused – Present

1st accused not ready to proceed as I conducted the case when I was confirmed.

I was not issued with witness statements. I was unable to prepare my defence.

I pray for retrial.

2nd accused I am ready to take defence.

Prosecution- we oppose the application by the 1st accused and the matter is at defence stage.

He has been in court all times and the prosecution closes their case.

The accused is out to break the wheel of justice.

The case should proceed to full hearing.

1st accused- I am not ready for that ruling.

Court- ruling on 5/2/18

S.O.TEMU, PM

2nd accused- I was not taken to hospital.

Court- 2nd accused to be taken for age assessment today before he is taken to Eldoret.

S.O.TEMU, PM

RULING

This matter was registered in the court on 20/2/17. It proceeded to hearing in the presence of the two accused persons who were informed of all the progress in English and Pokot.

When the matter came up for plea on 20/2/17 the two accused persons were supplied with witness statements which they acknowledge in court. The matter proceeded to hearing on 23/3/17 when prosecution witness testified and the accused had a chance to cross examine them which they did.

On 12/4/17 the 2nd accused opposed to have PW2 recalled for further cross examination I allowed the application and PW2 was recalled and she testified on 6/9/17.

The matter then proceeded to the close of the prosecution's case. The accused were placed on their defence on the 19/12/17 and when the matter came up for hearing on 9/1/18 the 2nd accused prayed that the prosecution be compelled to re-open their case and start afresh. The 1st accused objected to that.

Upon hearing the 2nd accused's request and fact that he was granted chance to prepare and recall the witnesses that he desired and he did so and to ask the matter start afresh.

The prosecution had closed their case and I have no reason or grounds to reopen it.

Matter to proceed to defence.

S.O.TEMU, PM

Read in the open court in the presence of the accused and clerk and prosecutor.

Hearing 19/2/18

S.O.TEMU, PM

The ingredients of the offence charged

14. The ingredients of the offence of robbery with violence c/s 296 (2) of the Penal Code were set out in ***Oluoch v. R***, (1985) KLR 549, as follows:

“It is not the degree of actual violence that differentiates the offence of robbery and robbery with violence. **Robbery with violence is committed in any of the following circumstances:**

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

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

c) 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.”

It was incumbent on the Prosecution to adduce evidence to establish the existence of the said ingredients of the offences.

Principles of law involved

15. The appeal can be appropriately reduced to two important issues of the value of circumstantial evidence in this case and the application of the doctrine of recent possession.

Circumstantial evidence

16. The Court of Appeal in ***Abanga alias Onyango v Republic CA CR. A NO. 32 of 1990 (UR)***, relied on by both the appellant as well as the DPP, set out the test of circumstantial evidence as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,

ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused

iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

See also ***Sawe v. R*** (2003) KLR 363.

17. In the words of the Court in ***Abanga***, supra, there is in this case a complete, and unbroken chain of events linking the appellant to the offence of robbery as well as in the discovery of the inculpatory evidence following the report to the police by the informer (PW2 who heard one suspect describing the incident to the sister. Evidential follow-up on the report of the said informer led the investigation to the appellant and the recovery of the stolen motor bike exactly as described in the information given by the informer. There can be no doubt, and there is no other explanation inconsistent with the guilt of the appellant, or consistent with his innocence, and the circumstantial evidence herein is safe to convict upon within the test of circumstantial evidence.

18. The chronology of the events establishing the chain of proof in the case is as follows:

1. PW1 the father finds out about the killing of his son and theft of motor cycle on the morning of 31/1/2017 at Kambi Wakulima in Marigat. The fact is confirmed by Assistant Chiefs PW3 for Perkerra sub-location and PW5 for Marigat township sub-location. PW7, the victim's brother also confirms visiting the scene, seeing the body lying outside the house and the motor cycle that the deceased was using missing. PW7 also witnessed the post-mortem before the body was released to them for burial at home. PW11 police officer from Marigat police station visited the scene and found the victim's body with a deep cut on the neck and another on the cheek.
2. In the evening of 31/1/2017 at Eldoret where she was boarding with the said sister, PW2 overhears a conversation between the 2nd accused and his sister, in which the 2nd accused details his robbery with one Kabom of a motor cycle and the killing of the victim by a Kabom using a panga he had been sharpening all day, and from interaction with the 2nd accused's sister learns that Kabom had run away with the motor cycle to Tangulbei where he was offering it for sale.
3. PW2 then called the area chief in Marigat PW5 at 7.00am on 1/2/2017 informing him of what she had overheard and the chief confirmed that one person had been killed and a motor cycle stolen.
4. PW2 reports the matter to the police at Langas Police station Eldoret on 1/2/2017 at 9.00am leading to the arrest of the 2nd accused at Eldoret. PW8 police officer Walles Otieno of Langas police station confirm the report and arrest of the 2nd accused later in the evening.
5. Upon information by PW2, the assistant chief Marigat township (PW5) reported the matter at Marigat police station and investigations commenced.
6. PW4 Dr. Sargo confirms death of victim caused by "asphyxia secondary to neck injury with a sharp object."
7. PW1, PW3, PW5 and its owner PW6 testified on the theft of the motor cycle, the latter producing ownership documents therefor.
8. PW9, confirms the identity of the appellant as Kabom who is his "brother from home" and testified that following information of the robbery and he involvement of Kabom, upon search for the appellant on 1/2/2017 between 11.00pm and 5am the following day at Tangulbei on instructions by the chief and police officers by a group of people he named as Sukuta, Losiwanyang and Loturiareng and Ngorot initially in the company of policers upto the point at Kwichatisi, and the key to the motor cycle was recovered by one Losiwanyang from the appellant's pocket and the search party then recovered motor cycle and number plate at a point where the appellant had pointed them to in the forest a distance of 2km from where the appellant had been found sleeping at a hotel. PW9 explained that the search party had gone with petrol because they had been informed that the appellant had left the motor cycle without petrol, and Sukuta (PW10) had driven it back to Tangulbei upon recovery and arrest of the appellant.
9. PW10, boda boda operator at Tangulbei testified that he had seen the appellant riding the stolen motor cycle which he had noted the bent number plate and had taken part in the search for the appellant
10. The appellant's defence denied any knowledge of the victim or the matter before the court save to confirm arrest on the night of 2/2/2017.

Evidence of theft

19. The ingredient of **theft** in robbery with violence was established by motor cycle owner who had given the cycle to victim to operate *boda boda* business, the father of the victim who on finding the body of his son lying outside his house noted that the motor bike was missing a matter confirmed by the evidence of the two assistant chiefs PW3 and PW5 and, as testified by PW9 and PW10, its subsequent recovery on the night of 2/2/2017 and 3/2/2017 at Kwachitisi in Tangulbei said to be a day's journey away from where it was stolen from victim's home in Marigat.

Wounding and death of the victim

20. The death of the victim of the robbery, which was confirmed by the father (PW1), PW3 Assistant Chief Chebii of Perkera location, (PW5) Assistant Chief Marigat Township Titus Katilat, PW7 the victim's brother who visited the scene and also attended the post-mortem and the Post-mortem Doctor, Dr. Kennedy Sargo, who certified the cause of death as "**asphyxia secondary to neck injury with a sharp object.**" In this, the ingredient of robbery with violence that "**the offender wounds, beats, strikes, or uses other personal violence to any person**" is established.

21. The doctrine of recent possession of stolen items also points to the inference that the appellant was one of the robbers in view of the additional evidence of the informer PW2.

Failure to call certain witnesses

22. Where several persons witness a recovery of an item, it is not necessary in my view to call the person who actually removes the item from the suspects pocket; the evidence of the other persons who witness the recovery may suffice. This is especially so as in the case where other evidence point to the recovery of the stolen with the person. If the key to the motor cycle completed the recovery of the motor cycle, the fact that it was witnessed by the two witnesses although actually done by another person, in their presence, is sufficient. However, in this case, the recovery of the motor cycle and its registration number plates at places pointed out by the appellant is proof of possession of the stolen motor cycle, apart from its keys.

23. In addition, failure to call all the witnesses who could be called by the Prosecution as witnesses of a particular fact is not fatal. It is only fatal where the evidence adduced does barely prove the fact, and there is then a presumption that the evidence left out would have been adverse to the case of the Prosecution. See *Bukenya and others v. Uganda* (1972) EA 549 held that –

“where the evidence called is barely adequate, the court may infer that the evidence of un called witnesses would have tended to be adverse to the prosecution.”

24. The prosecution was, accordingly, not obliged to call all the persons with whom the appellant was found at Tangulbei before recovery of the motor bike or all the persons involved in the search party leading to his arrest and recovery of the stolen motor vehicle.

25. Moreover, the failure to call the person who actually recovered the motor bike key from the appellant’s pocket is not fatal in the circumstances of this case where the motor bike was recovered at a different place pointed out by the appellant. Even if the key had not been recovered and the motor bike was recovered at the place where the appellant had led the search party, recovery from him would have been established.

26. Indeed, no number of witnesses is required to prove a fact. A single witness may prove a fact. In this regard section 143 of the Evidence Act is in the following terms:

“143. Number of witnesses

No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”

27. In this issue of recovery of the motor cycle keys two witnesses PW9 and PW10 both testify to the recovery of the keys from the pocket of the appellant by one Losiwanyang who was in their search party deputed by the police and the administration to trace the appellant at Tangulbei is in agreement in material particulars that the keys were recovered from the pocket of the appellant, and that the motor bike and the number plate for the same were recovered at places in the forest where the appellant had pointed them search party. When juxtaposed the evidence of the two eye-witnesses PW9 and PW10 on the recovery is consistent and corroborative of each other as to the arrest of the appellant at a hotel at Kwichatis after 11.00pm when the search commenced, recovery of the keys, motor cycle and number plate during the night search between 11.00pm and 5.00am, and delivery of the motor cycle driven by PW10 together with the appellant upon arrest to the Tangulbei Police station on the 3/2/017 at 5.00am.

28. The difference is estimated distance from where the appellant was arrested and where the motor cycle was recovered as 2km according to PW9 and 1km according to PW10 is insignificant bearing in mind possible disparities in witnesses’ appreciation of distances, and to the two areas the said witnesses appear to have been describing. PW9 described the spot where the motor cycle was recovered as follows:

“We asked him where the motorcycle he stated that he did not have it.

One Losiwanyang had removed the motor cycle keys from the 1st accused’s pockets. He had stated that the motor cycle was far. We had left that place with the 1st accused on to one point where he had kept the motor cycle 2 Km away. When we reached on point in the forest the 1st accused had pointed to where the Motor Cycle was.”

PW10 described the point at which they branched to the place of recovery as follows

“We had asked him to go and point on where the motor cycle was. The said Kabom had sat in Kikon’s motor cycle and Kiragu had sat behind. We had gone towards Nasorot road for about 1 km and he asked to enter into the rough road and after a while he asked us to alight and he pointed out to us where the motor cycle was.

The “after a while” in the testimony of the PW10 may account for the extra kilometer, and I do not find merit in the alleged contradiction in the witnesses’ estimation of the distance.

29. PW12 asserted that he had collected the appellant from Tangulbei for presentation before the court on 3/2/2017. However, on examination of the record of the trial court, the appellant was presented before the court on 20/2/017. The appellant does not deny arrest at Tangulbei on the night of 2/2/2017 and arraignment at Kabarnet Principal Magistrate’s Court.

30. The appellant’s defence did not raise any doubt as to the prosecution’s case and only adverted to events surrounding his arrest on 2/2/2017 about “1am when people came into my house by kicking the door open” and his subsequent transfer to Kabarnet Police station and arraignment before court. There was no explanation as to why the two eye witnesses on the arrest and recovery of the stolen property would frame the appellant. The appellant’s co-accused alleged a grudge with PW2 who he claimed to be his former girl-friend who when scorned threatened to teach him a lesson, as it were. However, the genesis of the discovery of the crime through informer PW2 who did not know the appellant at a far-away town from where the crime occurred removes any notion of set up.

31. No questions of identity can arise when the arrest was by persons who knew him as Kabom, including his brother PW9 (and the appellant has in his submissions before this court signed off as alias Kabom) and when he is the one who upon arrest led the search party to the recovery of the motor cycle.

Alleged contradiction in evidence

32. The court does not find contradictions in the evidence of the prosecution witnesses as are material to raise a doubt as to the involvement of the appellant in the charged offence. The fact that PW9 had not seen the appellant riding a motor bike before does not indicate that he could not have been riding the motor cycle on the material date. Neither is an identification of a motor bike only possible by its registration number colour or make. Indeed, PW9 and PW10 were witnesses of the recovery of the motor cycle at the place in the forest pointed out by the appellant. Such a witness could identify the motor cycle by its *bent* number plate. It is the owner PW6 who was required to identify the recovered motor cycle as his stolen motor bike, which he did. I also do not see any contradiction in the statement on record in the testimony of PW9 that the appellant had said he did not have the motor cycle and yet went on to point out to them where it was hidden. The testimony as recorded in the proceedings of the court is in the following words:

“We asked him where the motorcycle he stated that he did not have it.

One Losiwanyang had removed the motor cycle keys from the 1st accused’s pockets. He had stated that the motor cycle was far. We had left that place with the 1st accused on to one point where he had kept the motor cycle 2 Km away. When we reached on point in the forest the 1st accused had pointed to where the Motor Cycle was.”

It is clear from the statement of the witness that he was testifying that the appellant had told them that he did not have the motor cycle with him there but it was far away from there which turned out to be 2km away in the evidence of the witness.

Doctrine of recent possession

33. In its simple expression, the principle of recent possession provides for an inference as observed in *Hassan v. R* (Omolo, Githinji & Waki, JJA) KLR 151 that –

“Where an accused person is found in possession of recently stolen property in the absence of any reasonable explanation to account for his possession a presumption of fact arises that he is either the thief or a receiver (see *Andrea Obonyo v. R* (1962) EA 542 at page 549).”

34. In a significant decision relevant to the facts in this case the Court of Appeal in *Arum v. R* (2006) 1 KLR 233 (Tunoi, O’Kubasu and Onyango Otieno JJA.) elaborated the principle as follows:

“1. Before a Court can rely on the doctrine of recent possession as a basis of conviction in a criminal case, there must be positive proof:

- a. That the property was found with the suspect;**
- b. That the property was positively the property of the complainant;**
- c. That the property was stolen from the complainant;**
- d. That the property was recently stolen from the complainant.**

2. The proof as to time will depend on the easiness with which the stolen property can move from one person to another.

3. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the alleged stolen property and any discredited evidence on the same cannot suffice, no matter from how many witnesses.

4. In case the evidence as to search and discovery is conflicting, then the Court can rely on the adduced evidence after analysing it and accepting that it considers it to be correct and an honest version.”

See also Court of Appeal at Nyeri (Tunoi, Bosire & Githinji, JJA.) in *Isaac Ng’ang’a Kahiga & another v Republic* [2006] eKLR to similar effect.

Definition of possession

35. The appellant protested that he was not found in possession of the motor cycle as the person who allegedly recovered the keys to the motor cycle did not testify and there was contradiction between PW9 and PW10 as to where the motor cycle was recovered. Possession within the meaning of the Penal Code does not require the item to be found on the person, that it was recovered at the place where he led the recovery team to is sufficient possession as possession is defined in section 4 of the Penal Code. In answering the question whether an accused person must be in physical possession of stolen items for the application of the doctrine of recent possession, the Court of Appeal in *Gachuru v. R* (2005) 1 KLR 688 considered it a fallacy “that there was no possession by the appellant because it was not physical” and cited the definition at p. 695:

“Possession is defined in the Penal Code in section 4, as follows:

“(a) “be in possession of” or “have in possession” includes not only having in one’s own personal possession, **but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place**

(whether belonging to or occupied by oneself or not) for the use or benefit of one self or of any person;

(b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them.”

That definition, we think, is wide enough to cover the circumstances prevailing in this case [where the stolen items were not physically held by the appellant items were found within the vicinity of his abode or wherever he was found]. *We are also satisfied that the two lower courts correctly evaluated the evidence on possession of recently stolen goods and applied the presumption of law arising therefrom correctly – see **Andrea Obonyo v. R** (1962) EA 542.”*

36. It is immaterial that in this case the motor cycle was not recovered with the appellant physically but at a place a distance of 1 Km according to PW10, or 2 Km according to PW9, to which the appellant led the search party as the motor cycle had been placed there by him for his own benefit.

37. The doctrine of recent possession was properly invoked, the appellant having been found in possession of the stolen motor cycle on the 2/2/2017 barely a day after the theft on the night of 30/31 January 2017 without any break in the chain of possession from the theft thereof at Marigat through Tangelbei, a day’s ride away, to the spot in the forest where the appellant had hidden the motor bike when it ran out of fuel until it was recovered therefrom by the search party at his direction.

Right to counsel

38. It is the appellant’s co-accused who having established to be a minor at the time of sentencing may have complained of trial without the benefit of counsel provided for minors under section 186 of the Children Act. There is, however, before the court no appeal by the second accused who may already have served his three year borstal remand in full.

39. The appellant in this case always had the right to counsel which he did not exercise but was as shown in the length cross-examination and submissions he was afforded full opportunity and was able to conduct his defence in the trial. No breach of Article 50 (2) and general fair trial rights under Article 25 of the Constitution have been established.

Finding by the appellate court

40. The court finds that the prosecution proved its case against the appellant the offence of robbery with violence contrary to section 296(2) of the Penal Code on the basis of circumstantial evidence adduced by the prosecution and on the inference of the doctrine of recent possession of stolen property. On the sentence, I respectfully agree with the trial court that the heinous act of killing the victim of the robbery by cutting his neck in cold-blood while he slept calls for a severe punishment.

Orders

41. Accordingly, for the reasons set out above, the appellant’s **appeal from conviction and sentence** in the judgment of the trial court dated 21st March 2018 herein is without merit and the same is dismissed.

Order accordingly.

DATED AND DELIVERED THIS 6TH DAY OF AUGUST 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in Person.

Ms. Caroline Muriu, Prosecution Counsel for the Respondent.