REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 78 OF 2019

APPELLATE SIDE

(Coram: Odunga, J)

JOHN MUTUNGA MUENI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Kangundo Principal Magistrate's Court Criminal Case No. 145 of 2017, **M A Opanga, SRM** on 4th September, 1999)

REPUBLIC .....PROSECUTOR

VERSUS

JOHN MUTUNGA MUENI.....ACCUSED

JUDGEMENT

1. The appellant herein **John Mutunga Mueni** was charged in Count I with Robbery with Violence Contrary to Section 295 as read with Section 296(2) of the ***Penal Code***, the facts being that on the 26th day of January, 2017 at Kwa Mwaura Trading Centre, Kyanzavi Location, Matungulu sub county within Machakos County, the Appellant jointly with others not before court while armed with crude weapons namely *panga* iron bar and sword robbed one **Jones Wambua Mbithi** unknown amount of money, DVD player ,mobile phones make Samsung and Nokia 1100 all valued at Kshs 20,800/= and at the time of such robbery fatally injured **Jones Wambua Mbithi**.

2. In count II he faced the charge of Handling Suspected Stolen Property Contrary to Section 322(1) as read with Section 322(2) of the ***Penal Code***, the facts being that on the 26th day of January 2017 at Kwa Mwaura market Kyanzavi location, in Matungulu Sub County, he received and retained two mobile phones make Samsung and Nokia 1100 all valued at Kshs 11,000/= knowing or having reason to believe it to be stolen property.

3. The appellant having pleaded not guilty to the said charges, the Respondent called 9 witness in support of the prosecution case.

4. According to PW1, **Florence Nduku**, on 25th January, 2017 at about 10.45pm she was in her house, behind their shop with her husband, **Jones Wambua**, the deceased, who had closed their shop. That night there was a blackout. After taking super they went to sleep. In the course of the night, she woke up to breastfed her 8 months old baby and heard the door of the shop being opened. She continued breastfeeding the baby but heard the sound again. She then woke up the deceased who confirmed that someone was breaking the door. The deceased then blew the whistle for about 20 minutes and PW1 heard someone call the deceased's name just outside the door and then there were knocking at the door. Getting no response, they heard footsteps of people running and the deceased thought that they had left. He then opened the door and went out. Thereafter the deceased returned running, took a *panga* and left with it but never returned. PW1 then got out to go and look for the deceased but did not see the deceased. Shen then heard someone scream about 30 metres away and since she was with her 8 months old baby, she got inside the house to wake up the other child. It was her evidence that there was a blackout.

5. As she was in the process of making a call, she heard footsteps of people entering the house. The said intruders demanded for money in a chorus threatening to kill her and her child the way they had killed her husband. One them cut her on her forehead and on the nose and she begun bleeding. She then pleaded with them not to kill her and her children. She then went to her husband's coat and removed some money whose amount she did not know and handed it to them. She was the taken to the shop where the intruders took the phones which they were charging for their customers, a DVD player make Sony which belonged to the welfare group but was kept by the deceased and the deceased's phone, Samsung Note, before leaving.

6. As they left PW1 followed them from behind and stood outside the shop. She then saw a torch being shone at her and when the attackers saw it they ran away and hid behind a neighbour's vehicle. Upon hearing gun shots, PW1 believed that the same must have been by the police and she gesticulated with her hand where the robbers had hidden. Since she was still bleeding, she entered the house and while there she heard a man call her to come out and when she did, she found a police officer had arrested one person though she was unable to identify him due to the crowd that had gathered. The following day, she learnt that the body of her husband had been taken to the mortuary. She was then called to Kangundo Police Station where she identified the DVD, her husband's phone and one of the customer's phone whose receipt had been availed. She was treated at a nearby clinic.

7. On 26th January, 2017 at 1.30am PW8, **Cpl Itheri Munjuri**, attached to Donyo Sabuk Police Station and who was in charge of Kwa Mwaura Police Post, received a call from a business lady who informed him that there were robbers at the Trading Centre along Mwaka Stores Area. Upon failing to contact get in touch with the watchman at the Centre and a colleague, he proceeded to the market but at first did not find anyone. When he went to the other side of the market, he saw a woman who directed him to where a vehicle was parked and he shot in the air. When he did so three men came out of the motor vehicle which was usually parked there and dispersed in different directions, one of them carrying a green pack. PW8 chased him and when the man heard his shooting in the air, he changed directions and ran towards the direction where there were security lights but PW8 pursued him, tripped him and caught him when the accused fell down near AIC Church. The man had thrown a mobile phone in the thicket but after being arrested, PW8 led him back to the market and at the market PW8 found his colleague who had arrived and then arrested man identified himself as **John Mutunga Mueni**, the Appellant. When they inspected this bag, they found 6 mobile phones one of which had a name tag with a charger, packets of cigarettes, a padlock, a *panga* and a sword. PW8 also retrieved the phone which had been thrown away by the accused in the thicket which was identified by PW1 as her husband's Samsung. While interrogating PW1, he realised that she was injured and was taken by members of the public for treatment. Upon searching for the deceased, they found him dead behind the shops. Later at 5pm when he returned to the scene he recovered a metal bar.

8. PW2, **Mary Katuli Muindi**, who had closed her bar on the night of 25th January, 2017 at 1.00am, received a call from one **Mbakula** who informed her to call the watchman and inquire from him what was happening at the market. The watchman did not however pick the call and instead hanged on her thrice. PW2 then called a *bodaboda* who upon arrival informed her that her bar had been broken into. When they proceeded to her bar, they found a crowd of people there and PW2 found her the door broken and her TV and the coins in the cash box missing. She learnt that her neighbour, the deceased, had been killed that night his body was found behind the shop and his body was taken away by police officers. At Kangundo Police Station, she identified her TV with her initials and three empty Guinness bottles. While she came to learn that one person had been arrested, she did not know him before.

9. PW3, **Lucas Wambua Ndeto**, a businessman at Kwa Mwaura closed his shop on 25th January, 2017 at 10pm and proceeded home. At 11pm he heard gunshots and was informed by neighbours that there had been a robbery at the market. When he went there he found several shops had been broken into including his and his phone and two others stolen. Also stolen were packets of cigarettes, coins and airtime. At the police station, he identified one phone and saw the person who had been arrested.

10. PW4, a businessman at Katini Market had similarly closed his shop that night at 9pm when he received a call at 10pm from the security to go to his shop. There, he found the door open and found his LG TV and remote, phone, coins and safaricom credit card missing. Later he was called at Kangundo Police Station where he identified the TV, remote, Hot Point and Phone. Though he was informed that they were found in possession of the Appellant, he did not get to see him.

11. PW5, **Joseph Nzioka Kioko**, identified the body of his brother, **John Wambua**, the deceased, at Donyo Sabuk Nursing Home on 30th January, 2017 for the purposes of pot-mortem. The same procedure was witnessed by PW6, **Cpl Eliud Ngare** and the post mortem examination was conducted by **Dr Ndegwa**, PW7, who took blood samples which he handed over to PW6 to take to the Government Chemist for analysis.

12. PW7, **Dr Peter Muruiki Ndegwa**, carried out post mortem examination on the deceased's body on 30th January, 2017 after which he formed an opinion that the deceased's cause of death was injury to the head caused by blunt and sharp object and he exhibited his report.

13. PW9, **Henry Kiptoo Sang**, the Government Analyst compared the blood samples of the deceased with the samples on the metal rod and concluded that the two matched and he produced his report.

14. PW10, **Cpl Samuel Kamau**, was told by the DCIO Kangundo to investigate the incident. He received from the police officers from Kwa Mwaura the recovered items and took the Appellant to Donyo Sabuk Police Station. From there, the Appellant took them to various homes where they recovered other assorted items. He produced the recovered items as exhibits.

15. Upon being placed on his defence, the Appellant testified that on 25th January, 2017 he had a birthday party to which he invited his friends and after the party his friend left leaving him with three others who were residents of Thika. He then took them to Metro Club, a 24/7 club where they stayed till 1.30pm when he called two *bodaboda* operators who were his friends to carry the said friends back to his house where they arrived at 4am. he spent with two of his friends in his single room while the other friends spent at his neighbour's **Martin**.

16. On 26th January, 2017, the next day, they woke up at 7.30am, took tea and since his friends wanted to visit 14 Falls, he took them there and he returned to work. According to him, he was with his said friends from 12.30pm to 3pm. When they reached Donyo Sabuk Market, **James Makau**, said he wanted to say hallo to a friend whose home was next to the market. The said **James Makau** requested for the Appellant's motor bike which the Appellant gave to him and he sent the Appellant Kshs 3.500/- by Mpesa and the Appellant was left at Donyo Sabuk with a friend after which they boarded a vehicle to Thika arriving at BAT at 6.30pm. The appellant then received a call from the said **Makau** who informed him that his friend was stranded at the door and the Appellant should go get him and stay with him. The Appellant boarded a bike, went and got the said friend and they boarded a vehicle. Upon arriving at Donyo Sabuk the vehicle stopped and said that since it did not have passengers it would not reach Tala and the Appellant was sent Kshs 1,00/- via Mpesa and they took a bike to Kwa Mwaura where they found the said **Makau** in a club where they ate and drunk. After eating the said **James Makau** and his friends left the Appellant guarding the drinks while they proceeded for a meeting at the back. **Makau** then gave him the key but did not show him where the bike was by which time it was 10pm.

17. When the bar owner wanted to close, the Appellant returned some drinks and remained with three bottles. When he tried to call his friend, the phone was picked but no one spoke. The Appellant then saw commotion and people running and when he went out he was ordered to stop but because people were running, he also ran when he saw people approaching him. When he stopped he was arrested by the police and he was beaten till he lost consciousness. When he came to at 6am he was told to accompany the police take the deceased to the morgue and was taken to the Hospital for treatment. When the police asked him to take them to his friends' houses he did so and the police arrested his friends and also came with assorted items. After that they proceeded to the Appellant's house where he had a wife and a child and after interrogating his wife, the police removed things from the house included his properties.

18. In her judgement, the Learned Trial Magistrate found that the Appellant and his accomplices were apprehended after PW1 pointed out to PW8 were they were hiding. Upon being apprehended the Appellant was found with some of the stole items. The following day the Appellant took the police to the houses of his accomplices where other stolen items were recovered. He therefore found that the prosecution had proved its case beyond reasonable doubt and proceed to convict him accordingly.

19. Aggrieved by the said decision, the Appellant preferred this appeal raising the following grounds:

1) THAT the Trial Magistrate erred in law and fact by not considering the whole evidence as required by law.

2) THAT the Trial Magistrate failed to prove the case to the required standards in law.

3) THAT the Trial Magistrate erred in law and fact by failing to find that the Appellant was not properly identified as the perpetrator of the offence charged.

4) THAT the Trial Magistrate erred in law and fact by failing to note that the appellant's right to fair trial in Article 50 of the Constitution was violated.

20. In his submissions the Appellant reiterated that none of the witnesses testified that they saw him as one of the perpetrators of the offence in question and no identification parade was conducted. According to the Appellant, the item which the Appellant was said to have been found in his possession were not the ones which were identified by the witnesses in the case and that the alleged phones and the TV that were alleged to have been stolen from the witnesses were never recovered from him. According to the Appellant, the prosecution never rebutted his evidence. It was his evidence tah6 his was a case of mistaken identity. According to the Appellant, this case was poorly investigated and the benefit of doubt ought to go to him.

21. It was further submitted that the Appellant's right to fair trial under the Constitution was violated because after begging to be furnished with the trial records and despite being ordered to do so, the prosecution failed to comply. As a result, the Appellant was unable to cross-examine the witnesses.

22. On behalf of the Respondent, it was submitted that that PW1 did not identify the appellant at the scene as a torch was shone over her face and she was also cut on her fore head and her nose was hit and she was bleeding. Pw8 in his testimony found the robbers at the scene and when they saw him, they ran in different directions. He gave chase while he shone his torch and managed to get hold of the appellant. Where the appellant ran towards there were security lights and indeed, he managed to trip the appellant and arrested him. Upon search the stolen items were found in possession of the appellant.

23. It was submitted that the appellant was placed at the scene, arrested as he fled from the scene and found with stolen goods namely Samsung and Nokia 1100 mobile phones.

24. As to whether the Appellant was supplied with witness statements, it was submitted that the record shows that indeed the appellant requested for witness statements 31st March, 2017 and the court Ordered that he be supplied with the copies of the statements. Similar court orders were issued for the supply of the statements on 12th May, 2017 and 9th June, 2017. There after the appellant did not request for the statements, this can be implied that he was issued with the statements as the record is silent. The appellant participated in the trial by cross examining the prosecution witnesses and also did his defense. Therefore, he was not prejudiced.

25. In light to the foregoing, it was submitted that the trial prosecutor proved his case beyond any reasonable doubt as the evidence tendered was credible, consistent and well corroborated and it was urged that this appeal be dismissed, and both the conviction and sentence of the trial court be upheld.

Determination

26. This is a first appellate court. As such, I am expected to analyse and evaluate afresh all the evidence adduced before the lower court and draw my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."

27. Similarly, in **Kiilu & Another vs. Republic [2005]1 KLR 174,** the Court of Appeal stated thus:

> **1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.**
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> **2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.**

28. It has been held that in a first appeal the appellant is entitled to expect this Court to subject the evidence on record as a whole to an exhaustive re-examination and to this Court's decision on the evidence having given allowance to the fact that this court did not see the demeanour of witnesses. Further even where the appeal turns on a question of fact, the Court has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the trial Court with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it. See **Pandya vs. R [1957] EA. 336** and **Coghlan vs. Cumberland (3) [1898] 1 Ch. 704**.

29. However, it must be stated that there is no set format to which a re-evaluation of evidence by the first appellate court should conform. I adopt what was stated by the Supreme Court of Uganda in the case of **Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634**, thus:

> **"The extent and manner in which evaluation may be done depends on the circumstances of each case and the style used by the first Appellate Court. In this regard, I shall refer to what this court said in two cases. In Sembuya v Alports Services Uganda Limited [1999] LLR 109 (SCU), Tsekooko JSC said at 11:**
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> > **'I would accept Mr. Byenkya's submission if he meant to say that the Court of Appeal did not go into details of the evidence, but that is really a question of style. There is really no set format to which the re-evaluation should conform. A first Appellate court is expected to scrutinise and make an assessment of the evidence but this does not mean that the Court of Appeal should write a judgment similar to that of the (trial).'"**

30. In **Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR), Odoki, JSC** (as he then was) said:

> **"While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance."**

31. The case against the Appellant, in summary, was that on the night of 26th January, 2017 while PW1and her husband, the deceased were sleeping, PW1 while waking up to breastfeed her 8-month old baby heard their door being broken into. She awoke the deceased who blew his whistle and the intruders called him by name then took off. The deceased then left and shortly thereafter returned to the house and took his *panga* and again left. Since he did not return, PW1 decided to check what was happening and went out. There she heard a scream and returned to the house. The intruders then entered her house and demanded for money threatening her with death just as they had killed the deceased. PW1 gave them the money and they then proceeded to her shop where they took with them took the phones which they were charging for their customers, a DVD player make Sony which belonged to the welfare group but was kept by the deceased and the deceased's phone, Samsung Note, before leaving. As they were leaving PW1 followed behind and stood outside the gate. Shortly a torch was shown on her and the robbers ran and hid inside a parked vehicle. Believing, rightly, that the person shinning the torch was a police officer, PW1 directed him to the direction where the robbers had hidden. The said Police Officer was PW8 who then fired a shot in the air and the robbers scattered in different directions. However, the Appellant who had a green pack was pursued by PW8 who managed to apprehend him but not before he threw away a mobile phone.

32. Upon his apprehension, it was found that the said pack had several mobile phones, one of which had a name tag, packets of cigarettes, padlock, *panga* and sword. PW8 also retrieved another Samsung phone which PW1 identified as the deceased's. According to PW1, the said Samsung Note had a broken screen. She also managed to identify a Nokia Phone belonging to a customer based on the customer's receipt.

33. Upon his arrest, the Appellant took police officers to the houses of the co-accused from where other items including the DVD were recovered. In his evidence, the Appellant did not expressly deny that these items were recovered from him. He did not explain how he came into possession of the same. He however admitted that he was the one who led the police to the houses of his co-accused from where other items were recovered. He however contended that he was simply arrested outside the Club and was not in the know about the activities of his co-accused.

34. Section 296 of the ***Penal Code*** provides as hereunder:

> ***296. (1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.***
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> ***(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.***

35. Therefore, for the offence of robbery to be proved there must be evidence of theft by the person charged. A person cannot be guilty of the

offence of robbery unless he is guilty of theft. The theft must however be accompanied by the use or threat of use of actual violence to a person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained. If all these ingredients are present and the offender was armed with any dangerous or offensive weapon or instrument, or was in company with one or more other person or persons, or at or immediately before or immediately after the time of the robbery, he wounded, beat, struck or used any other personal violence to any person, he would have committed robbery with violence and would be liable to be sentenced to death.

36. In this case, it is clear that there is no direct evidence linking the Appellant to the offence since there was no eye witness who testified that they saw him at the time of the commission of the offence.

37. Proof in criminal cases can either be by direct evidence or circumstantial evidence. When a witness, such as an eyewitness, asserts actual knowledge of a fact, that witness' testimony is direct evidence. On the other hand, evidence of facts and circumstances from which reasonable inferences may be drawn is circumstantial evidence. On this issue, **Mativo, J** in **Moses Kabue Karuoya vs. Republic [2016] eKLR** expressed himself as hereunder:

> **"The evidence used to prove guilt is classified as either direct or circumstantial. Direct evidence, is a statement about a fact constituting a disputed material proposition of a rule of law, while circumstantial evidence is testimony about a fact or facts from which the disputed material proposition may be inferred. Thus, circumstantial evidence can be defined as relying on certain proved or provable circumstances from which a conclusion can be drawn that it was the accused person who committed the offence. It is evidence of circumstances which can be relied upon not as proving a fact directly but instead as pointing to its existence. It differs from direct evidence, which tends to prove a fact directly, typically when a witness testifies about something which that witness personally saw, or heard. Both direct and circumstantial evidence are to be considered, but to bring a verdict of guilty based entirely or substantially upon circumstantial evidence, it is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the circumstances. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty. This follows from the requirement that guilt must be established."**

38. Therefore, where circumstantial evidence meets the legal threshold, it may well be a basis for finding the accused person culpable of the offence charged. In fact, in **Neema Mwandoro Ndurya v. R [2008] eKLR**, the Court of Appeal cited with approval the case of **R vs. Taylor Weaver and Donovan (1928) 21 Cr. App. R 20** where the court stated that:

> **"Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."**

39. In this case, as stated above, the trial court had to rely on circumstantial evidence if the case against the Appellant was to be proved. Whereas it is appreciated that a charge may be sustained based on circumstantial evidence the courts have established certain threshold to be met if a conviction is to be based thereon. In **Sawe –vs- 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; Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."**

40. In **R. vs. Kipkering Arap Koske & Another [1949] 16 EACA 135,** in the Court of Appeal for Eastern Africa had this to say:

> **"In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."**

41. In **Abanga Alias Onyango vs. 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."**

42. In **Mwangi vs. Republic [1983] KLR 327 Madan, Potter JJA** and **Chesoni Ag. J. A**. held:-

> **"In order to draw the inference of the accused's guilt from circumstantial evidence, there must be no other co -existing circumstances which would weaken or destroy the inference. The circumstantial evidence in this case was unreliable. It was not of a conclusive nature or tendency and should not have been acted on to sustain the conviction and sentence of the accused."**

43. Therefore, for this court to find the accused guilty the inculpatory facts must be incompatible with innocence and incapable of explanation upon any other hypothesis than that of guilt. This proposition was well stated in the case of **Simon Musoke vs. Republic [1958] EA 715** as follows:

> **"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."**

44. In **Teper v. R [1952] AC at p. 489** the Court had this to say:

> **"Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference."**

45. One such circumstantial evidence applies in situations where the doctrine of recent possession may be properly invoked. Delivering the judgment for the majority, **McIntyre J.** in the Canadian Supreme court case of **Republic vs. Kowkyk (1988)2 SCR 59** explored at length the history of the doctrine in various decisions from its roots in the nineteenth century in England and Canada and said in part:

> **"Before going further, it will be worthwhile to recognize what is involved in the so called doctrine of recent possession. It is difficult, indeed, to call it a doctrine for nothing is taught, nor can it properly be said to refer to a presumption arising from the unexplained possession of stolen property, since no necessary conclusion arises from it. Laskin J. (as he then was) (Hall J. concurring) in a concurring judgment in R. v. Graham, supra, said at p. 215:**
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> > **"The use of the term 'presumption', which has been associated with the doctrine, is too broad, and the word which properly ought to be substituted is 'inference'. In brief, where unexplained recent possession and that the goods were stolen are established by the Crown in a prosecution for possessing stolen goods, it is proper to instruct the jury or, if none, it is proper for the trial judge to proceed on the footing that an inference of guilty knowledge, upon which, failing other evidence to the contrary, a conviction can rest, may (but, not must) be drawn against the accused."**
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> **He went on to point out that two questions, that of recency of possession and that of the contemporaneity of any explanation, must be disposed of before the inference may properly be drawn. He made it clear that no adverse inference could be drawn against an accused from the fact of possession alone unless it were recent, and that if a pre-trial explanation of such possession were given by the accused and if it possessed that degree of contemporaneity making evidence of it admissible, no adverse inference could be drawn on the basis of recent possession alone if the explanation were one which could reasonably be true. Implicit in Laskin J.'s words that recent possession alone will not justify an inference of guilt, where a contemporaneous explanation has been offered, is the proposition that in the absence of such explanation recent possession alone is quite sufficient to raise a factual inference of theft."**

46. In the end, the majority of that Supreme Court accepted the following summary of the doctrine:-

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

47. In **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic Cr App. No. 272 of 2005(UR),** the Court of Appeal held that:

> **"It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved.**
>
> **In other words, there must be positive proof:**
>
> > **i). that the property was found with the suspect;**
> >
> > **ii). that the property is positively the property of the complainant;**
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> > **iii). that the property was stolen from the complainant;**
> >
> > **iv). that the property was recently stolen from the complainant.**
>
> **The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."**

48. The applicability of the doctrine of recent possession was dealt with in **Erick Otieno Arum vs. Republic [2006] eKLR** where he Court of Appeal held:

"In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses. In case the evidence as to search and discovery of the stolen property from the suspect is conflicting, then the court can only rely on the adduced evidence after analysing it and after it accepts that which it considers is the correct and honest version. That duty as has been said is wholly on the trial court and on the first appellate court. This court has no such duty on hearing a second appeal such as before us but if it be satisfied that that duty has not been fully discharged by the first appellate court then it will take the line that had it been done either or both courts would have arrived at a different conclusion."

49. In **Malingi vs. Republic, [1989] KLR 225**, the Court of Appeal had this to say about the doctrine of recent possession:

"By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. Firstly, that the item he has in his possession has been stolen; it has been stolen a short period prior to their possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and the circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the items. The doctrine being a rebuttable presumption of facts is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole or was a guilty receiver."

50. In his sworn testimony, the appellant neither denied that he was found in possession of the deceased's phone and a phone belonging to one of the deceased's customers said items nor did he attempt to explain his possession of the same. In this case the evidence was that the said stolen properties were in possession of the appellant soon after they were stolen.

51. In the absence of an explanation as to how the Appellant came into possession of the said stolen items the presumption must be drawn that he was part of the gang that broke into the deceased's shop and house and stole therefrom. I am therefore satisfied that the above ingredients of recent possession were proved by the prosecution. Although the Learned Trial Magistrate did not allude to the doctrine of recent possession, as I have stated hereinabove this Court is obliged to re-evaluate the evidence and arrive at its own decision keeping the necessary precautions in mind. I therefore find that the recent possession of the phones by the appellant clearly implicated him in the robbery.

52. The appellant contended that his right to fair trial was violated in that he was never furnished with statements. Article 50(2)(c) and (j) of the Constitution provides as hereunder:

(2) Every accused person has the right to a fair trial, which includes the right—

(c) to have adequate time and facilities to prepare a defence;

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

53. It is therefore clear that the appellants were entitled to be informed in advance of the evidence the prosecution intended to rely on, and to have reasonable access to that evidence. In **Dennis Edmond Apaa & Others vs. Ethics & Anti Corruption Commission [2012] eKLR** the court had this to say on the same: -

"The words of Article 52(2) (j) that guarantee the right to be informed in advance cannot be read restrictively to mean in advance of the trial. The duty imposed on the court is to ensure a fair trial for the accused person and this right of disclosure is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it. This right is to be read together with other rights to fair trial. Article 50(2) (c) guarantees the accused the right to have adequate facilities to prepare a defence. This means the duty is cast on the prosecution to disclose all evidence, trial materials and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure if made during the trial the accused must be given adequate facilities to prepare his/her defence. The obligation to disclose was a continuing one and was to be update when additional information was received."

54. In **R vs. Ward [1993] 2 All ER 557**, **Glidewell, Nolan and Steyn, LJJ** held that:-

"The prosecution's duty at common law to disclose to the defence all relevant material, i.e. evidence which tended either to weaken the prosecution case or to strengthen the defence, required the police to disclose to the prosecution all witness statements and the prosecution to supply copies of such witness statements to the defence or to allow them to inspect the statements and make copies unless there were good reasons for not doing so. Furthermore, the prosecution were under a duty, which continued during the pre-trial period and throughout the trial to disclose to the defence all relevant scientific material, whether it strengthened or weakened the prosecution case or assisted the defence case and whether or not the defence made a specific request for disclosure. Pursuant to that duty the prosecution were required to make available the records of all relevant experiments and tests carried out by expert witnesses."

55. However, as was held by the Court of Appeal in **Republic vs. Ahmad Abolfathi Mohammed & Another [2019] eKLR**:

"The record indicates that the appellants were availed all the statements of the prosecution witnesses before those witnesses testified. They also had access to the exhibits that were produced. What we understand the appellants to complain about is that they were not availed the intelligence report that led to their arrest for suspicion of involvement in terrorism acts. Our reading of Article 50(2) (j) of the Constitution does not grant the appellants the blanket right to access all the information in possession of the police including intelligence reports. What the appellants were entitled to was the evidence that the police intended to rely on at the trial, and of course any other evidence in possession of the police that could have exonerated them from the charges they were facing, even though the police did not wish to use that evidence. Indeed, even the right to access the evidence that the police intend to rely on is not totally unfettered; it is qualified by the constitutional requirement that the access should be reasonable, the determination of which must depend on the circumstances of each case. In *Bakari Rashid v. Republic [2016] eKLR*, this Court refused to fault the prosecution for failure to produce police informers as witnesses. It stated thus:

> **"Police officers and crime-busters, most of the time use informers to gather information regarding crime. The informers are normally secretive as they go about their business and to open them up by calling them as witnesses in open court would certainly blow up their cover, compromise them and expose them to danger. That will defeat the very purpose for which they exist. That is why they are never called or are rarely called as witnesses."**

We are therefore satisfied that the appellants' right to fair trial under Article 50(2)(j) was not violated because all the evidence that the prosecution produced in support of its case was availed in advance to the appellants."

56. In Kenya, the prosecution is obliged to inform the accused in advance of the evidence they intend to rely on, and to give the accused reasonable access to that evidence. It is an obligation that never shifts to the accused and hence even without an accused applying for the same, the prosecution has a constitutional duty to place the said material at the disposal of the accused upfront. That is my understanding of the decision of the Court of Appeal in **Simon Githaka Malombe vs. Republic [2015] eKLR,** where the said Court expressed itself as follows:

"We do not quite fathom how the appellant can possibly be to blame for the prosecution's failure to supply the witnesses' statements requested by the appellant and ordered by the trial court. It would seem that both courts below somehow considered the appellant to blame for not having money to photocopy the statements. This notwithstanding that he was in custody and had indicated on the record that his kin had not been to see him. To adopt the stance of the two courts would be to stigmatize and even criminalize poverty or inability to pay for statements. It is rather surreal…It is the prosecution that assembles and retains custody of evidence against an accused person. The duty of disclosure lies with the prosecution and not with the court. In the face of clear constitutional provisions, it is not a responsibility that the Office of the Director of Public Prosecutions can shirk. Whenever an accused person indicates inability to make copies, the duty must lie with the State, which the prosecutor represents, to avail the copies at State expense. It is for that Office to make proper budgetary allocation for that item. Then only can the constitutional guarantee in Article 50(2) (c) and (j) be real."

57. In this case, the record does indicate that on 31st March, 2017, the appellant requested for witness statements and it was ordered that he be furnished with copies of the same. On 12th May, 2017, the Appellant informed the Court that he did not have statements and once again the Court directed that the statements be supplied in court. The position seemed not to have changed till 9th June, 2017 when the Appellant once more made the same request and the Court directed that he be furnished with copies of witness statements and the first report. The issue of the supply of the statements seems to have ended there and on 28th December, 2017 when the first witness took the witness stand, the Appellant informed the Court that he was ready to proceed. From the evidence on record, it is clear that the Appellant only cross-examined those witnesses whose evidence tended to directly link him with the commission of the offence while those who did not do so, he did not cross-examine. It is therefore my view that the contention that the appellant was not supplied with the witnesses' statement is not borne out by the record and that ground must similarly fail.

58. The upshot is that the appellant was convicted on sound evidence and the Learned Trial Magistrate was justified in reaching the decision he reached and convicting the appellant of the offence of robbery with violence contrary to section 296(2) of the ***Penal Code***. Accordingly, there is no valid reason to interfere and I hereby uphold the conviction.

59. As regards the sentence, the Supreme Court in **Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015,** (**Muruatetu's case**), held at para 69 as follows:

"47. Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights, and in the same vein Article 25(c) of the Constitution elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse.

[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right.

[49] With regard to murder convicts, mitigation is an important facet of fair trial. In *Woodson* as cited above, the Supreme Court in striking down the mandatory death penalty for murder decried the failure to individualize an appropriate sentence to the relevant aspects of the character and record of each defendant, and consider appropriate mitigating factors. The Court was of the view that a mandatory sentence treated the offenders as a faceless, undifferentiated mass to be subjected to

the blind infliction of the penalty of death thereby dehumanizing them.

[50] We consider *Reyes* and *Woodson* persuasive on the necessity of mitigation before imposing a death sentence for murder. We will add another perspective. Article 28 of the Constitution provides that every person has inherent dignity and the right to have that dignity protected. It is for this Court to ensure that all persons enjoy the rights to dignity. Failing to allow a Judge discretion to take into consideration the convicts' mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence thereby treating them as an undifferentiated mass, violates their right to dignity.

[51] The dignity of the person is ignored if the death sentence, which is final and irrevocable is imposed without the individual having any chance to mitigate. We say so because we cannot shut our eyes to the distinct possibility of the differing culpability of different murderers. Such differential culpability can be addressed in Kenya by allowing judicial discretion when considering whether or not to impose a death sentence. To our minds a formal equal penalty for unequally wicked crimes and criminals is not in keeping with the tenets of fair trial.

[52] We are in agreement and affirm the Court of Appeal decision in *Mutiso* that whilst the Constitution recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed. We also agree with the High Court's statement in *Joseph Kaberia Kahinga* that mitigation does have a place in the trial process with regard to convicted persons pursuant to Section 204 of the Penal Code. It is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness.

[53] If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualise the circumstances of an offence or offender may result in the undesirable effect of 'overpunishing' the convict."

60. Section 296(2) of the ***Penal Code*** provides that the offender convicted for robbery with violence in circumstances stipulated therein *"shall be sentenced to death."*

61. That the principles enunciated in the ***Muruatetu Case*** apply to the offence of Robbery with Violence was appreciated by the Court of Appeal in **William Okungu Kittiny vs. Republic, Court of Appeal, Kisumu Criminal Appeal No. 56 of 2013 [2018] eKLR** where it held that at paras 8 and 9 that:

"[8] Robbery with violence as provided by Section 296 (2) and attempted robbery with violence as provided under Section 297 (2) respectively provide that the offender:-

"…shall be sentenced to death."

The appellant was sentenced to death for robbery with violence under Section 296 (2). The punishment provided for murder under Section 203 as read with Section 204 and for robbery with violence and attempted robbery with violence under Section 296 (2) and 297 (2) is death. By Article 27 (1) of the Constitution, every person has *inter alia*, the right to equal protection and equal benefit of the law. Although the Muruatetu's case specifically dealt with the death sentence for murder, the decision broadly considered the constitutionality of the death sentence in general.

…..

[9] From the foregoing, we hold that the findings and holding of the Supreme Court particularly in paragraph 69 applies *mutatis mutandis* to Section 296 (2) and 297 (2) of the Penal Code. Thus, the sentence of death under Section 296 (2) and 297 (2) of the Penal Code is a discretionary maximum punishment. To the extent that Section 296 (2) and 297 (2) of the Penal Code provides for mandatory death sentence the Sections are inconsistent with Constitution."

62. The effect of the said decisions in my view is and I hold that while the death penalty is not outlawed**,** but is still applicable as a discretionary maximum penalty for the offence of robbery with violence, section 296(2) of the ***Penal Code*** is however inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for the offence of robbery with violence. In this case the Learned Trial Magistrate sentenced the Appellant to life imprisonment. In so doing, the Learned Trial Magistrate stated that the said sentence was "provided by law". It is clear that in so finding the Learned Trial Magistrate fell into error. By making that finding, it seems that the Learned Trial Magistrate did not address herself to the need to exercise discretion. In **Felix Nthiwa Munyao vs. R Nairobi Court of Appeal Criminal Appeal No. 187 of 2000** the Court of Appeal expressed itself as hereunder:

"As we have said, the maximum sentence provided under Section 205 of the Code is life imprisonment. We will repeat what the Court said in the case of Gedion Kenga Maita vs. Republic Criminal Appeal No. 35 of 1997 (unreported). There, the Court stated:

'…We are not saying that a court has no power to impose a sentence of life: a court can do so depending on the circumstances of a particular case which circumstances must include the circumstances under which the offence itself was

committed, the circumstances of the accused person such as whether he is a first offender, how long he has been in prison awaiting trial and things of that nature.'

In the present case, the learned Judge wrote very elaborate notes on the sentence he imposed on the appellant. He took into account the fact that the attack on the deceased was brutal and vicious: that was correct and the learned Judge was right in doing so. He also took into account the fact that the vicious and brutal attack was on a wife in the presence of their very young daughter. Once again, that was correct and the Judge was entitled to take it into account. The attack, said the Judge. Was an act of domestic violence and the courts must do their part to discourage it. That was also correct and the Judge was perfectly entitled to consider it. These were matters on one side of the scale aggravating the crime committed by the appellant. But a court is also under a duty to take into account the matters in favour of an accused person. In this case, the appellant was, admittedly, a first offender. The learned Judge does not mention this factor at all in his elaborate notes on sentence. This was, however, a factor which the learned Judge was bound to take into account in favour of the appellant. Again, the appellant was arrested on 27th/28th December, 1998 and by the time the Judge sentenced him on 29th June, 2000, he had been in prison for nearly one and half years. The learned Judge did not mention this factor in his notes on the sentence. We think he was bound by the law to consider the two factors which were in favour of the appellant and weigh them against those which supported a severe penalty. Sentence is essentially a discretionary matter for the trial court but in exercising that discretion, the trial court must take into account all the relevant factors and leave out all irrelevant ones. An appeal court, which ours is, is only entitled to interfere with the exercise of discretion where it is shown that the court whose exercise of discretion is impugned, has either not taken into account a relevant factor, or taken into account an irrelevant factor or that short of these the exercise of the discretion is plainly wrong. Etyang, J appear not to have taken into account the fact that the appellant was a first offender and that he had been in custody for over one year before he was sentenced. The learned Judge's failure to take these factors into account gives us the right to interfere with the sentence he imposed on the appellant. We accordingly set aside the sentence of life imprisonment imposed on a man of some thirty-eight years and substitute it with a sentence of fifteen (15) years imprisonment to run from the date when the appellant was first sentenced by the superior court."

63. In this case the Appellant was treated as a first offender. His exact role in the commission of the offence is unknown save for the fact that he was found in possession of the stolen properties. While that does not in any way derogate from the fact that the ingredients of the offence were proved, his role may well determine the nature of the sentence he ought to serve. As the Supreme Court appreciated in the **Muruatetu's case** (supra) at paras 41-43:

"…it is without doubt that the Court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence."

64. The Court found that due process is made possible by a procedure which allows the Court to assess the appropriateness of the death penalty in relation to the circumstances of the offender and the offence.

65. This court in **Sammy Musembi Mbugua & 4 others vs. Attorney General & Another [2019] eKLR** held that:

"I agree with the Petitioners that the purpose of remission is to act as an incentive to the prisoner and encourage good behaviour, rehabilitation and self-improvement if a prisoner knows that his or her conduct directly affects his or her jail-term thus placing his or her destiny in his or her own hands…"

66. This Court however must not lose sight of the fact that in the process, a life was lost. Consequently, I set aside the life sentence imposed upon the appellant and substitute therefor a sentence of 40 years imprisonment to run from 27th February, 2017.

67. Orders accordingly.

Judgement read, signed and delivered in open Court at Machakos this 19th day of November, 2020.

G V ODUNGA

JUDGE

In the presence of:

Appellant in attendance online vide Skype

Mr Ngetich for the Respondent

CA Geoffrey