REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 13 OF 2020

PERMUIA OLE ROBIA

KUPERE OLE MAITEI

KUTEREI OLE KUYAN MAITEI.....APPELLANTS

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGEMENT

(From original Judgement, conviction and sentence in Mavoko Principal Magistrate's Court Criminal Case No. 783 of 2013, **Hon. J A Agonda, SRM** on 31st January, 2020)

BETWEEN

REPUBLIC.....PROSECUTOR

AND

PERMUIA OLE ROBIA

KUPERE OLE MAITEI

KUTEREI OLE KUYAN MAITEI .....ACCUSED

JUDGEMENT

1. The appellants herein were charged with two counts of robbery with violence contrary to section 296(2) of the ***Penal Code*** and an alternative charge of handling stolen goods contrary to section 322(2) of the ***Penal Code*** offences for which they pleaded not guilty in Mavoko Chief Magistrate's Court Criminal Case No. 783 of 2013.

2. In support of its case the prosecution called 11 witnesses.

3. According to PW2, he was working at the Ministry of Livestock Department of Sheep and Goats Station in Kitengela (the said Station) as a watchman that night on the night of 12th and 13th July, 2013 when they were attacked by 10 people armed with *pangas*, pliers and iron bars. According to him the attackers had torches. They chased him and when he fell down they held him by the neck while their torches were on and badly assaulted him and in the process he lost Kshs 1,500/-. He was then placed inside a room where he stayed till 3 am. When he came out he found the police officers in the compound and realised that his colleague, **Ranson Mwamburi** (the deceased) had been killed. It was his evidence that he was able to identify the attackers by the torches which they had though he had not seen them prior to that night. According to him, the 2nd appellant had a defect in his eye. At the identification parade, he was able to pick out the 1st and 2nd appellants.

4. On his part, PW1 testified that on the night of 12th and 13th July, 2013 he was sleeping in his house when he heard screams at 1.00am. Because there had been several screams that month he left his house and in the company of other people proceeded towards the Ministry of Livestock Department of Sheep and Goats Station in Kitengela where he found that a watchman had been killed while another one was lying down claiming that he had been beaten. They were informed that the attackers had gone away with the goats.

5. The following morning when he was working at Mlolongo below the fly over where he was digging a trench for Safaricom Fibre Optic, he saw four men driving about 34 sheep across the Fly Over. When he proceeded there he realised that the said sheep had identification marks belonging to the said Station. He proceeded to seek for help from a local watchman and with the help of the said watchman they managed to detained three people as one of them ran away. He then called his neighbours and the police were notified who went and took the said sheep with the arrested persons who were armed with knives and *rungus* which the witness identified. He also identified the three appellants as some of the attackers.

6. When PW2 raised the alarm upon seeing the said sheep on the Fly Over, it was PW6 who went and rescued the appellants from the mob and took them to the police station after arresting them. PW3, on the other hand was the Manager of Raz Security Services Ltd, the employers of the deceased. Upon receipt of the report of the attack he relayed the information to the administration. PW5, the officer in Charge of the Station also received the information of the attack and the fact that the sheep had been stolen and identified the photographs of the said sheep as belonging to the Station. The body of the deceased which was examined by PW10 was identified by PW4 while PW8 printed the photographs taken at the scene. The said Identification parade was however conducted by PW9 on the instructions of the Investigations Officer, PW11.

7. In their sworn evidence, the three appellant testified that they were guarding a farm in Athi River when early in the morning the 1st appellant who was on night shift saw he sheep grazing on the farm. According to them it was unusual for sheep to be on the farm unattended at night. The 1st appellant then notified the 3rd accused who was also on night shift and when the 2nd appellant reported to relieve the 1st appellant the three of them sought from a neighbour, DW4, whether he was aware of the ownership of the said animals. Getting negative response from DW4, they decided to seek out the owners of the said animals and it was when they were in the process of doing so that they were accosted by a crowd and eventually arrested by the police. They denied any wrong doing and insisted that they were not involved in the robbery and the attack.

8. In her judgement the learned trial magistrate found that the attackers were armed and were in the company of more than one person who attacked PW2. She also found that the complainant's sheep were stolen during the attack. According to the learned trial magistrate PW2 testified that the 2nd appellant held PW2 by the neck and identified he appellants because the torches were shone on his face and he positively identified the 1st and 3rd appellants on the parade but was unable to identify the 2nd appellant. The Learned Trial Magistrate also found that the appellants were found in possession of 34 sheep in the morning after the robbery incident hence the doctrine of recent possession was applicable. It was her finding that by raising an alibi defence late, it was an afterthought on the part of the appellants.

9. After hearing, the trial court found the appellants guilty of the two offences of robbery with violence as well as the offence of handling stolen property. For the two counts of robbery with violence they were sentenced to 30 years each while for the alternative count they sentenced to 4 years each. The said sentences were directed to run concurrently.

10. Aggrieved by the said decision the appellants have preferred this appeal based on the following grounds:

> **1. The trial magistrate erred in law and in fact convicting the appellants in the absence of their advocate and in absence of mitigation hence denied the appellants a fair trial.**
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> **2. The learned trial magistrate erred in law and in fact by failing to consider that the prosecution had not proved its case beyond reasonable doubt.**
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> **3. The learned trial magistrate erred in law and fact by imposing harsh sentences in circumstances.**
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> **4. The trial magistrate erred in law and fact by disregarding the evidence of the appellants.**
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> **5. The trial magistrate erred in law and fact by failing to consider that the evidence by the prosecution was contradictory in materials particulars.**
>
> **6. The trial magistrate erred in law and fact by failing to consider that the identification of the appellants was not to required standards.**
>
> **7. The trial magistrate erred in law and fact by holding that the prosecution had proved ingredients of robbery with violence and handling stolen property.**
>
> **8. The trial magistrate erred in law and fact by failing to consider that the complainant never testified.**

11. In this appeal it is submitted on behalf of the appellants, **by Mr Itaya**, that the Magistrate erred in law and fact in convicting the appellants in the absence of their advocate. According to the Appellants, though they were represented by an advocate throughout the proceedings, at the sentencing the record is not clear why the advocate was excluded from the proceedings. This was a clear violation of Articles 49 and 50 of the Constitution. The violation prejudiced the appellants because the sentences imposed were very harsh and the Magistrate imposed a deterrence sentence without assigning any reason at all.

12. It was further submitted that the Court erred in law and fact in failing to consider that the prosecution had not proved their case beyond

reasonable doubt. Whereas in Count **1,** the appellants were charged with Robbery with Violence Contrary to Section **296(2)** of the ***Penal Code***, the particulars being that on the **12th, 13rd day of July 2013** at Kasuito livestock farm Athi River sub location the appellants robbed and killed **Renson Mwamburi,** it was submitted that the said charge was not in line with particulars since it talked of robbery with violence whereas the particulars disclosed the offence of murder. To the appellants, the Magistrate did not have jurisdiction to entertain a charge where a person had been killed, a preserve of the High Court, hence the conviction and sentence imposed on Court 1 was illegal and unlawful**.** In any case no witness was called to confirm authoritatively that the appellants committed the offence in Court 1 in that the appellants killed **Renson Mwamburi.** From the evidence on record, it was submitted that neither PW1 nor PW2 saw the 1st and the 3rd appellant at the scene and that PW2 only identified the 3rd appellant in Court. That evidence of dock identification was taken by the Court without cautioning itself. There is no evidence that the 2nd accused was armed at all. The intensity of light was so much such that identification of 2nd appellant could not be possible.

13. It was submitted that as regards the 2nd appellant PW-2 said he could identify him by seeing because he had a defective eye which evidence was discounted by the evidence PW-9 who said that he never noticed that the said appellant had a defective eye. It was reiterated that PW-1 confirmed that he did not see the appellants and that the same applies to PW-2 who confirmed that the appellants 1 and 3 were never at the scene. As regards the identification of PW-2, the same was doubtful and the Honourable Magistrate filled gabs in prosecution's case when he held that the three appellants and others were at the scene.

14. As to whether the appellants were armed or not, the Court was urged to compare what was in the charge sheet and what was produced in Court. The charge states clearly the weapons recovered as'' pliers, *pangas* and metal bars'', but what was produced in court as exhibits were sword, dagger and two clubs. It was also noted that what was reported was not what was recovered from the appellants. The items produced as exhibits were at variance with particulars in the charge sheet. There is no evidence that the appellants were armed since what was recovered were normal Maasai traditional attires. Accordingly, it is obvious that the ingredients of the offence of robbery with violence were not proved.

15. According to the appellants, their evidence was not considered critically. 2nd appellant had gone to relieve the 1st and 3rd appellants from work. He was not present throughout the night. The 1st and 3rd appellants were at work at night and in the morning they found the animals stranded, so they could not leave them unattended. That evidence was not considered critically since it favoured the appellants. The alibi defence set up by the accused was not investigated by the Court though, according to the appellants, that defence was raised not very late in the proceedings.

16. In the appellants' view, the Honourable Magistrate erred in law and fact by imposing harsh sentences in the circumstance. Further, the Honourable Magistrate erred in convicting the appellants on both two main counts and the alternative count since the 3rd Count was an alternative charge to the main two counts. The sentence given was not only very harsh but was without any justification.

17. It was argued that the Honourable Magistrate erred in law and fact in failing to consider that the prosecution evidence was contradictory in material particulars and that the exhibits produced in evidence contradicted those that had been enumerated in both Count 1 and Count 2 of the charge sheet. PW-2 said he was attacked by 10 people but in the P3 form it indicated 3 people. Further, on identification, the evidence of PW-2 contradicted that of PW-9 Inspector Ngaira. PW-2 said the 2nd appellant had a defective eye but PW-9 identification parade officer said 2nd appellant did not have a defective eye. Evidence by PW-9 shows that a parade was conducted on the appellants, however no eye witness testified having attended parade. The evidence of PW-9 was not corroborated by any eye witnesses.

18. As regards, the 3rd Count of handling stolen property, it was submitted that the evidence of prosecution was not compared to that of the defence by the Honourable Magistrate. According to the Appellants, PW-1 and PW-2 could not place the appellants at the scene of the crime but at the scene where goats were recovered. The overall evidence is that the defence by the accused was not considered by the Court since the Court took it as an afterthought. The appellants raised the defence of alibi and it was upon the Court to call the prosecution to counter the evidence and not to attack the defence in the judgment**.** The appellants defence that they found the animals stranded and were helping to secure them was not interrogated at all. The appellants were guarding the same place where the animals were recovered. There is no evidence that the appellants knew that the animals were stolen or they dishonestly retained them.

19. They therefore prayed that the appeal be allowed.

20. The appeal was conceded to by the Respondent. In so doing, **Mr Ngetich**, the Learned Prosecution Counsel, drew the attention of the court on how the identification parade was conducted in this case. PW9 testified that he used to work at Athi River as the officer in charge of crime and his rank was an Inspector. He referred to the rules of identification parades are set in the Police Force Standing orders and noted that failure to adhere to the identification parade guidelines will affect the evidential value of a resulting identification, as it was stated in the Court of Appeal case in **Samuel Kilonzo Musau vs Republic** and **R vs. Mwango s/o Manaa** and **Ssentale vs. Uganda,**

21. According to the Respondent, there is no evidence that the identification parade in this case, complied with the set guidelines. The identification of a suspect is always very critical before the courts proceed to convict a suspect on the threshold of leaving no reasonable doubt. Where an identification parade as part of evidence like in this case is an issue, it has been held that the Police Force Standing Orders in respect of the conduct of identification parades if the guidelines are not adhered to, the evidence of identification becomes questionable. Visual identification in criminal cases can cause miscarriage of justice and should be carefully tested.PW1 testified that the robbery took place at 1:00 am and the same was confirmed by the police officers that visited the scene.

22. The Respondent relied on **Wamunga vs. Republic (1989) KLR 424** at 426 and submitted that the third appellant was not identified during the identification parade and the same was confirmed by the officer conducting the parade. The second appellant testified that the fellow suspects did not look like him at all, he testified that during the identification parade no-one had special features like his-one blind eye. The officer who conducted the ID parade confirmed that he did not have any other members in the parade with a blind eye. The ID parade officer also confirmed that the first appellant had two lower teeth extracted and ear lobes were pierced and no other member had such appearance in the parade. He also confirmed that some members appeared in more than one parade. Given the above, the identification

parade was therefore flawed and filled with unfairness to the appellants and nullities hence not admissible in court.

23. On the issue of identification, the State submitted that the evidence of PW2 that he identified the assailants at night since they were holding torches is not watertight. The case of **Nzaro vs. Republic (1991) KAR 212,** the Court of Appeal held that evidence of identification by recognition at night must be absolutely watertight to justify a conviction. In that he did not state the direction where the torches were pointing, did they point at each other, was there any other source of light to enable him to identify the appellants, how long did they assault him. The same was echoed in **R –vs- Turnbull & Others (1976) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. PW2 did not specify how he was able to identify the appellants, if there was any other source of lighting or security lights at the area hence his testimony was questionable. He alleged that the assailants had torches and the torches were being shoved over his face, therefore he could not see the assailants. Further the complainant did not state in his examination in chief that he attended an Identification parade and he saw any of the appellants in the parade. The issue of identification parade came out in his cross examination.

24. It was submitted that the prosecution charged the appellants with the offence of robbery with violence. From the particulars of the charge, it is alleged that the appellants were armed with dangerous weapons namely pliers, pangas, and metal bars while they committed the offence. The conflict between the evidence and the charge in the instant case was that whereas the charge described the weapon that the Appellants were armed with as being pliers, iron bar and panga, while what was adduced in court to support the charge were two clubs and a dagger. The type of weapon the Appellant had was very material to the charge due to its nature. The charge being robbery with violence, it was material whether the weapon the appellants were alleged to have could cause injury or inflict harm to somebody. According to the Respondent, *the items found with the appellants did not fall in the definition of dangerous weapons as they were watchmen and also the items were Maasai traditional attire. The prosecution did not establish that the same weapons had been used during the robbery.*

25. As regards the conviction on both main count and alternative count, it was submitted that looking keenly at the judgment of the trial magistrate, the appellants herein were convicted on both the main counts and the alternative charge. Based on the case of **Justus Ndakala Alukwe vs. Republic [2003] eKLR** and **I E vs. Republic [2016] eKLR,** it was submitted that when an accused person is charged with both the main count and an alternative, and the court finds him guilty or he pleads guilty to the main count, the alternative count becomes irrelevant. The court can only turn to the alternative count if it dismisses the main count. It is clear that a person cannot be a robber and a handler or receiver of the items that he is alleged to have stolen. He should either be a robber or, in the alternative, a handler. He cannot be both. This means that once a person is convicted of the main count of robbery then he cannot again be convicted of the alternative of handling the same items that he has been convicted of having stolen. The trial magistrate was therefore in error in convicting the appellants on the main count as well as the alternative count. This prejudiced the Appellant's and caused substantial injustice.

26. According to the Respondent, it is trite law that the correct approach is for the trial court to exhaustively examine the entire prosecution evidence in totality and weigh it against that of the appellants and make a finding supported by reason. It was submitted that PW6 (Arresting officer) testified that he knew 2nd and 3rd appellants as security guards at Herp Developers site. After he arrested them, they told him that they found the sheep stranded at their yard and they were driving them to the police station and the mob arrested them. When put on their defence the appellants stated that they were guards at Herps Developers and they found the sheep on the unfenced land they were guarding at 6 AM stranded. They adduced that they were at their work stations on the night of 12 & 13 July 2017. The learned trial magistrate failed to consider the evidence adduced by both parties and failed to appreciate that the Appellants exonerate themselves from the offence. Therefore, the trial magistrate erred and went ahead and convicted them.

27. It was therefore submitted that, in view of the above, this ground of appeal was not considered by the trial court therefore the State conceded the appeal as the conviction was unsafe and sentence irregular. The Court was urged to make a finding that the trial proceedings prejudiced the Appellant and the Respondent prayed that the conviction be quashed and the sentence meted be set aside.

Determinations

28. Even though the State conceded the appeal, it is not automatic that this court must in those circumstances allow the appeal since the court has the duty to put the evidence to afresh scrutiny and arrive at its own determination. In **Odhiambo vs. Republic (2008) KLR 565,** the court said:

> **"the court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence."**

29. In **Lamek Omboga vs. R., Kisumu Court of Appeal Criminal Appeal No. 122 of 1982** it was held that:

> **"When the appeal opened before us, Mr Okoth for the appellant began submitting that as State Counsel did not support the conviction in the first appeal in the High Court, the State was in effect withdrawing the charge and the appeal should have been allowed. With respect, we do not agree. An appellate court is not in any way bound by the opinion of State Counsel as to the merits of an appeal."**

30. This being a first appeal, the court is expected to analyse and evaluated afresh all the evidence adduced before the lower court and draw its own conclusions while bearing in mind that it 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."

31. Similarly, in the duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in **Pandya -vs- Republic [1957] EA 336** is as follows: -

> **"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."**

32. 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.**
>
> **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.**

33. In this case, the eye witness to the incident was PW2. However, in cross-examination he stated that he never saw either the 1st or the 3rd appellant at any time. He however stated it was the 2nd appellant who held his neck and he saw him because of the many torches the attackers had which were shone on his face and legs. Through those torches he noticed that the 2nd appellant had a defect in his eye. It is therefore clear from his evidence that the 1st and the 3rd appellants were not placed at the scene of the crime.

34. In **Maitanyi vs. Republic [1986] KLR 198**, it was held, with respect to the reliability of the evidence of a single identifying witness as follows:

> **"Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with greatest care the evidence of a single witness respecting identification…The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made."**

35. In **Wamunga versus Republic (1989) KLR 424** the Court of Appeal spoke of the evidence of identification generally in the following terms:

> **"It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."**

36. The same court acknowledged in **Ogeto vs. Republic (2004) KLR 19** that a fact can be proved by a single identification witness except that such evidence must be admitted with care where circumstances of identification are found to be difficult; it noted as follows:-

> **"It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken."**

37. In **Abdala bin Wendo & Another versus Republic (1953), 20 EACA 166** the East African Court of Appeal it held that:

> **"Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to the guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."**

38. The Court of Appeal for East Africa discussed the danger of relying on such evidence without warning in **Roria versus Republic (1967) EA 583 at page 584**. It stated:

"A conviction resting entirely on identity invariably causes a degree of uneasiness…That danger is, of course, greater when the only evidence against an accused person is identification by one witness and though no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification."

39. While it is true that the Prosecution's evidence was based on recognition, as was appreciated in **R vs. Turnbull & Others (1976) 3 All ER 549**:

"The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? *In what light*? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?...Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made." [Emphasis added].

40. In **Criminal Appeal No. 24 of 2000 - Paul Etole & Reuben Ombima versus Republic**, the Court of Appeal reiterated the need for caution by holding that:

"The appeal of the 2nd appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriage of justice. But such a miscarriage of justice occurring can be much reduced if whenever the case against an accused person depends wholly or substantially on the correctness of one or more identifications of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally it should remind itself of any specific weakness which had appeared in the identification evidence. It is true that recognition may be more reliable than the identification of a stranger; but even when witness is purporting to recognise someone who he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made. All these matters go to the quality of the identification evidence. When the quality is good and remains good at the close of the accused's case the danger of mistaken identification is lessened, but the poorer the quality the greater the danger. In the present case, neither of the two courts below demonstrated any caution. This is a serious non-direction on their part. Nor did they examine the circumstances in which the identification was made. There was no enquiry as to the nature of the alleged moonlight or its brightness or whether it was a full moon or not or its intensity. It was essential that there should have been an enquiry as to the nature of the light available which assisted the witnesses in making recognition. What sort of light, its size and its position the vis-à-vis the accused would be relevant."

41. In **David Mwangi Wanjohi & 2 Others vs. Republic [1989] eKLR** it was held by the Court of Appeal that:

"The quality of the evidence has to be considered. Does starlight afford a means of illumination for observing the shape or features of a person to such a degree that proof can be had beyond reasonable doubt, or is it a state of darkness richer in imagination than fact? There is no doubt that starlight *per se* affords no scientific means of illumination at all. It may purport that there was a clear sky, against which there might be seen the semblance of a human being. But it is not an assured basis, such as moolight, for observing the details of the features of a person. Indeed Nelson could not tell what clothes the appellant was wearing, however close the latter was to Nelson. It is plain that Nelson could not see details, and the appellant did not speak, nor move in any special way, or indicate any special feature. We are bound to say that the quality of the evidence was precarious at best, and that it was a misdirection for the High Court to conclude that the conditions for "identification were not unsatisfactory." However long Nelson had known the appellant, if there was no light by which to see the appellant, nor other means of recognition, Nelson could only have guessed at the identity of the man near him, and in that event the failure to put the cardinal question, could Nelson have been mistaken, was a grave error. It is also surprising to find that the High Court felt that mistaken identify was not raised by the defence. The appellant had said that he had not been present. Is that not raising the issue of mistaken identity? It is said that he did not cross-examine Nelson on mistaken identity. Was that not suggested by the question to which the answer was "no, I could not recognize the clothes you were wearing when I was attacked." But in any case, upon whom was the burden of proof? Was it not upon the prosecution who were relying on improbable evidence?"

42. Similarly, in the present case, the caution and the necessary inquiry was not made before the trial court. According to PW2, the attackers were about ten and they had torches which they shone on his face. If that was true, then one wonders how he was able to identify the attackers. He admitted that he was shaken from the attack. In my view the prevailing conditions were not conducive to a proper identification.

43. The Learned Trial Magistrate seemed to have formed the view that since the weapons that the attackers had were similar to those with which the appellants were found, then it must necessarily follow that it was the appellants who were the attackers. With due respect, the appellants were all Maasais. It is common knowledge that the so called "weapons" with which they were found are part of the Maasai attire. The mere fact that they were in possession of the same ought not to have been used as a basis for finding that they must have been among the group that attacked the station the previous night.

44. As regards the evidence of identification parade, identification of a suspect in any criminal offence is always a pivotal question and whenever it arises the trial court has to satisfy itself, before convicting him, that the question has been disposed of to such threshold as to leave no doubt that the suspect was positively identified. Where an identification parade, as part of the evidence of identification is in issue, it has been held that if the police force standing orders in respect of conduct of identification parades are flouted, the value of evidence of identification depreciates considerably. In Nairobi Criminal Appeal No. 117 of 2005 - **David Mwita Wanja & Others versus Republic**

(2007) eKLR the Court of Appeal noted thus:

> **"The purpose for, and the manner in which, identification parades ought to be conducted have been the subject of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor to this Court emphasised that the value of identification as evidence would depreciate considerably unless an identification parade was held within the scrupulous fairness and in accordance with instructions contained in Police Force Standing Orders."**

45. The court proceeded to cite its own decision on this question in **Njihia versus Republic (1986) KLR 422** where it held at page 424:-

> **"Police Form 156 which is designed pursuant to Force Standing Orders issued by the Commissioner of Police under section 5 of the Police Act Cap 5 Laws of Kenya and which is invariably used in the conduct of identification parades expressly provides for 16 or so requirements which ought to be observed. As far as is relevant to this case, Standing Order 6(iv) (d) and (n) state as follows:**
>
> > **"6. (iv) Whenever it is necessary that a witness be asked to identify an accused/suspected person, the following procedure must be followed in detail: -**
> >
> > **……**
> >
> > **(d) The accused/suspected person will be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the accused/suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent;**
> >
> > **……**
> >
> > **(n) The parade must be conducted with scrupulous fairness, otherwise the value of the identification as evidence will be lessened or nullified;"**

46. The procedure for identification parades was laid out in the cases of **R vs. Mwango s/o Manaa (1936) 3 EACA 29** and **Ssentale v. Uganda [1968] EA 36**, and the rules include the following: -

> **i. The accused has the right to have an advocate or friend present at the parade**
>
> **ii. The witness should not be allowed to see the suspect before the parade and the suspects on parade should be strangers to the witness;**
>
> **iii. Witnesses should be shown the parade separately and should not discuss the parade among themselves;**
>
> **iv. The number of suspects in the parade should be eight (or 10 in case of two suspects);**
>
> **v. All the people in the parade should be of similar build, height, age and appearance, as well as of similar occupation, similarly dressed and of the same sex and race;**
>
> **vi. Witnesses should be told that the culprit may or may not be in the parade and that they should indicate whether they can make an identification; and**
>
> **vii. The investigating officer of the case should not be in charge of the parade, as this will heighten suspicion of unfair conduct in the courts.**

47. In this case, the 3rd appellant was not identified at the parade. As regards the 2nd appellant it was PW2's evidence that he had a defect in his eye. Yet there is no evidence that those who were with him in the parade had similar physical appearance. In fact, the officer who conducted the parade did not even notice this defect. Similarly, the 1st appellant had two lower teeth extracted and ear lobes were pierced. There was no evidence that the other members of the parade had similar features. It is therefore clear that the manner in which the parade was conducted cannot be said to have met the standard of scrupulous fairness. Accordingly, its value as evidence is worthless.

48. The only other evidence that was found to link the appellant with the offence related to the application of the doctrine of recent possession based on the fact that the alleged stolen animals were found in possession of the appellants the following morning.

49. 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:

> **"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."**

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."

50. 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."**

51. 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;**
>
> **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."**

52. 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."**

53. 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."

54. Laidlaw J.A put it more succinctly in the case of **R vs. O'keefe {1958} O.R. 499 (C.A .)** when he said:-

"It is possession by an accused person of recently stolen goods that constitutes the foundation of a prima facie case against him and creates a presumption of guilt. It is a persuasive presumption which imposes on the accused person a burden of giving an explanation of his possession that might reasonably be true. When such an explanation has been given the burden then continues to rest, as always, on the Crown to prove the guilt of the accused beyond reasonable doubt."

55. In this case the appellants explained, an explanation which was supported by the evidence of PW9 that they were employed as security guards at Herp Developers site. After PW9 arrested them, they told him that they found the sheep stranded at their yard and they were driving them to the police station and the mob arrested them. In their defence, they stated that found the sheep on the unfenced land they were guarding at 6 am stranded. They adduced that they were at their work stations on the night of 12 & 13 July 2017.

56. The Court of Appeal in **Charles Wanyonyi & Others vs. Republic Kisumu Criminal Appeal No. 134 of 2004** expressed itself as hereunder:

"Something needs to be said about the contents of the judgement of the learned trial Judge. It is to be observed that he carefully set out the evidence adduced by the prosecution and the defence of each appellant. Having done so it was expected that he would proceed to analyse and resolve the issues involved, giving reasons for his decision. This appears to have been omitted as the learned Judge merely relied on the evidence of PW1 and suddenly came to the conclusion that the appellants were guilty. We are not introducing any new issue here since this is what is provided for by section 169(1) of the Criminal Procedure Code (Cap. 75 Laws of Kenya)…Having set out what we considered salient points in the appeal and having noted that the learned Judge failed to give due consideration to matters relating to circumstantial evidence, identification of the appellants, contradictions in evidence by prosecution witnesses and the defence of alibi, we do not know what the final judgement by the learned Judge would have been had he applied his mind to them. We venture to state that had he taken all these matters into account, giving due consideration to each of the salient issues he would not have come to the same conclusion as he did…The curtain must come down on this appeal. The journey the appellants commenced in the trial Judge's court on 14th May, 1998 has come to an end. In view of what we have said as regards the unattended and unresolved issues by the learned trial Judge and upon our own evaluation of the evidence on record we are of the considered view that it would be unsafe to uphold the appellants' conviction on the two counts of murder. In the result, this appeal is allowed, convictions quashed and the sentences of death imposed on the appellants set aside. We further order that the appellants are to be set free forthwith unless otherwise lawfully held."

57. The same Court in **Antiphace Herman vs. R Mombasa Court of Appeal Criminal Appeal No. 40 of 1997** held that:

"None of the witnesses who gave evidence in the Magistrate's court identified the appellant and his co-accused (one Dominic Kiango Mutheu) as the actual thieves. The arrest of the two came to be as a result of the appellant and his co-accused running away when they saw a group of people coming towards them. These people chased the two and arrested them with the help of Tanzanian civilian group known as "Sungu Sungu" traditional guards. It was one Emmanual Longoto (P.W.2) who stated that the one of the accused persons (it is not clear whether it was the appellant on his co-accused) offered to free the cattle if he was paid Tanzanian shillings 80,000/=. As pointed out the accused persons were arrested after a chase. In such state of affairs, the appellant's defence in the Magistrate's court was that he was at the market in question where he saw some cattle being offered for sale. He saw some people carrying weapons. He ran away along with others. He was running towards his house. His co-accused followed him and he was arrested along with him and taken to Kenya. He said no one believed his story. The appellant said he was in the business of selling old clothes. In short his defence was that he had nothing to do with the stock theft and that he was arrested whilst running away along with others from a group of armed persons. The learned Magistrate in evaluating the defence of the appellant said:

"I do not believe that the accused No. II (the appellant) was arrested for no reason or be (sic) is alleged to have (sic) involved in theft because P.W.III Emmanuel has a grudge against him. The charge against the accused has been proved that he and the accused No.1 did go to the complainant's boma and stole 12 head of cattle from his boma and took them to Tanzania."

What the learned magistrate did not consider was whether the appellant's defence was probably true or whether it raised some doubt as regards him having been actually involved in the theft of the cattle. It is possible that the appellant's version could well be true, more so if looked at in conjunction with the evidence of the co-accused. The appellant had taken the same stand, as regards his arrest, immediately thereafter. He said that no one believed what he told them. He said "that I was not with the accused No.1". His witness (the co-accused) gave evidence to the effect that he had nothing to do with the appellant; that they were arrested in different places at different times; that the appellant did not talk to him; that he did not even talk to the appellant. It was held in the Tanzanian case of R.V. Wilbald vs. Tibanyendela [1948] E.A.C.A. 111 that the fact that an accused person has made a statement denying his guilt very soon after he has been charged with the offence may often be very relevant as showing the consistency of his conduct at that early date with the version of facts as given by him at his trial and may in some cases be the last ounce which turns the scales in his favour. On first appeal to the superior court, that court failed to evaluate the appellant's version of events although the superior court set down, somewhat sketchily, the appellant's version of events. The superior court also failed to consider the evidence of the co-accused. That is where in our view the superior court erred. It is incumbent upon the first appellate court to properly evaluate the whole defence of the appellant as brought out in the lower court. Failure to do so, when it is possible that the appellant's version may well be true, is fatal to the conviction. In those circumstances we allow the appeal, quash the conviction and set aside the sentence as meted out to the

appellant and order the appellant's immediate release unless otherwise lawfully held."

58. In this case I agree that the Learned Trial Magistrate failed to sufficiently consider the evidence adduced by both parties which exonerated the appellants.

59. It is also clear that the Learned Trial Magistrate erred in convicting the appellants on the main charge as well as in the alternative charge. As was held in **I E vs. Republic [2016] eKLR**;

> **"The trial magistrate having found him guilty of the offences in the main count should not have made a finding in respect of the alternative counts. Alternative counts stand in only when the main count fails. He, therefore, erred in law in doing so."**

60. From the record, it is clear that the appellants were represented by counsel. However, on the date of the sentencing they were not represented. The Supreme Court in **Muruatetu & Another vs. Republic [2017] eKLR, Petition No. 15 of 2015** expressed itself as hereunder:

> **"[46] We are of the view that mitigation is an important congruent element of fair trial. The fact that mitigation is not expressly mentioned as a right in the Constitution does not deprive it of its necessity and essence in the fair trial process. In any case, the rights pertaining to fair trial of an accused pursuant to Article 50(2) of the Constitution are not exhaustive.**
>
> **[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."**

61. Having considered the record and the issues raised herein, I agree with **Mr Ngetich**, Learned Counsel for the Respondent that the appellants' conviction cannot be sustained. Accordingly, I allow the appeal, set aside their conviction, quash the sentences imposed upon them and set them at liberty forthwith unless otherwise lawfully held.

62. Orders accordingly.

Judgement read, signed and delivered in open Court at Machakos this 14th day of December, 2020.

G. V. ODUNGA

JUDGE

In the presence of:

Mr Itaya for the Appellants

Mr Ngetich for the Respondent

CA Geoffrey