REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEALS 15 AND 16 OF 2018

PASCAL NYAMAI MULI.....1ST APPELLANT

RAI NDORO ZAHORO.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the original conviction and sentence of Hon. B. Koech SRM in Criminal Case No. 403 of 2015 delivered on 1st March 2018 in the Chief Magistrate's Court at Kwale)

JUDGMENT

The Appeals

1. The 1st and 2nd Appellants were jointly charged with four counts of robbery with violence, contrary to section 295 as read with 296(2) of the Penal Code. The particulars of Count I were that on 20th March 2015 at Nomad Beach Hotel in Diani within Kwale County of the coastal region, jointly with others not before the Court, and while armed with dangerous weapons namely pistols, they robbed Rosemary Mueni Munguti of two mobile phones make Samsung valued at Kshs 4,000/= each, and at or immediately before or immediately after the time of such robbery, used actual violence against the said Rosemary Mueni Munguti.

2. The particulars of Count II were that on 20th March 2015 at Nomad Beach Hotel in Diani within Kwale County of the coastal region, jointly with others not before the Court, and while armed with dangerous weapons namely pistols, they robbed Catherine Georgia Kenyatta of cash amounting to Kshs 35,000/=, and at or immediately before or immediately after the time of such robbery, used actual violence against the said Catherine Georgia Kenyatta.

3. The particulars of Count III were that on 20th March 2015 at Nomad Beach Hotel in Diani within Kwale County of the coastal region, jointly with others not before the Court, and while armed with dangerous weapons namely pistols, they robbed John Lockhart of cash amounting to Kshs 8,000/=, and at or immediately before or immediately after the time of such robbery, used actual violence against the said John Lockhart.

4. The particulars of Count IV were that on 20th March 2015 at Nomad Beach Hotel in Diani within Kwale County of the coastal region, jointly with others not before the Court, and while armed with dangerous weapons namely pistols, they robbed Simon Mtamu Mwawaza of a mobile phone make Nokia 208 valued at Kshs 5,000/=, and at or immediately before or immediately after the time of such robbery, used actual violence against the said Simon Mtamu Mwawaza.

5. The 1st and 2nd Appellants pleaded not guilty to all the counts in the trial Court on 20th April 2015, and after trial, they were convicted of the four counts of robbery with violence and were each sentenced to death for Count I, while the sentences for Counts II, III and IV were held in abeyance.

6. The 1st and 2nd Appellants are aggrieved by the judgment of the trial magistrate, and have preferred this appeal against the conviction and sentence. The appeals of the 1st and 2nd Appellant were consolidated to be heard and determined together at the hearing held on 29th August 2018. The 1st and 2nd Appellant's grounds of appeal are in their Petitions of Appeal filed in Court on 9th March 2018 as further amended by Amended Grounds of Appeal they availed to the Court, together with submissions thereon dated 27th September 2018.

7. The 1st Appellant's grounds of appeal are as follows:

1. THAT the learned trial magistrate erred in law and fact in convicting him without a proper finding that there was no

identification of the assailants to the complainants of this case.

2. THAT the learned trial magistrate erred in law and fact in convicting him in reliance on contradictions and inconsistencies in the evidence of PW8, owner of the recovered motorcycle registration No. KMDC 809 H to connect him with the case.

3. THAT the learned trial magistrate erred in law and fact in convicting him by failing to find that the anti-terror police who arrested him in Busia were not called to testify in the trial.

4. THAT the learned trial magistrate erred in law and fact in convicting him by failing to find that no doctor came to testify in the trial Court to prove beyond reasonable doubt that the cause of his injuries were gunshot wounds.

5. THAT the learned trial magistrate erred in law and fact in convicting him without a proper finding that he was arrested with nothing incriminative to connect him with this matter.

6. THAT the learned trial magistrate erred in law and fact in convicting him without a proper finding that the alleged confession was in contravention of Article 50 (2)(h) of the Constitution of Kenya.

7. THAT the learned trial magistrate erred in law and fact in convicting him and rejecting his defence statement as opposed to the confession.

8. The 1st Appellant submitted in this regard that there was insufficient and contradictory evidence by PW8 linking him to motorcycle registration no KMDC 809L . Further, that the prosecution case was based on suspicion by PW1 that he shot some of the robbers on the material night on the basis of which the 1st Appellant was arrested, and that no identification of the assailants was carried out. In addition, that he was not found with any incriminating evidence and no medical evidence was adduced to show that the injuries he sustained were gunshot wounds.

9. The 1st Appellant further submitted that the officers who arrested him at Busia on the basis of the injuries he had suffered were essential witnesses, and were not called to testify which weakened the Prosecution's case. Lastly, that the trial magistrate rejected his defence statement by relying on the confession that was not taken according to the provisions of the law. The 1st Appellant cited various judicial authorities in support of his arguments including the decision in **Bukenya vs Uganda (1968) EACA 549** and **Olivia vs R (1965) EACA 144**.

10. The 1st Appellant, in oral submissions made during the hearing, added that the person found with the motorcycle was not called as a witness to testify; no P3 form was produced to show any injuries suffered by the victims of the robbery; and the persons who stated that they witnessed his signature on the confession did not testify in Court. He also relied on the decision in **Fundi Bakari Fundi & Hamisi Ali Bakari vs R, Mombasa H.C CRA No. 298 & 299 of 2006.**

11. The 2nd Appellant on his part raised the following grounds of appeal:

1. THAT the learned trial Magistrate erred in law by sentencing him to suffer death without a proper finding that the mandatory death sentence is now outlawed.

2. THAT the learned trial Magistrate erred in law by sentencing him to suffer death without a proper finding that his fundamental rights were infringed by the mandatory nature of the section 296(2) of the Penal Code.

3. THAT the learned trial Magistrate erred in law by sentencing him to suffer death without a proper finding that he was condemned to death with prevailing enormous mitigating circumstances but for the mandatory nature of the offence which is now outlawed.

4. THAT the learned trial Magistrate erred in law by sentencing him to suffer death without appreciating the decision in the cases of Daniel Muthomi Marimi and Sammy Konde.

12. The 2nd Appellant in his submissions sought substitution of the conviction and sentence imposed upon him for a conviction and sentence for the offence of handling stolen property, on account of being found in possession of a phone stolen during the robbery in issue. The 2nd Appellant heavily relied on the Court of Appeal decisions in **Daniel Muthomi Marimi vs R, Nyeri CA CRA No. 166 of 2011** where a similar substitution of sentence was made, and where the doctrine of recent possession had been invoked and applied.

13. The 2nd Appellant also cited the Court of Appeal decision in **Sammy Konde Tuva vs R, Malindi CA CRA No. 25 of 2016** that the death sentence has now been declared unconstitutional by the Supreme Court of Kenya in the case of **Francis Karioko Muruatetu & Another vs R (2017) e KLR** . The 2nd Appellant in this respect relied on Article 27 of the Constitution to argue for the right to equal treatment and protection of the law, and Article 50(2)(p) on the right to benefit from the least severe of the prescribed punishment for an offence.

14. Lastly, the 2nd Appellant, in oral submissions made during the hearing of the appeal, in addition contended that he was charged with two offences in the charge sheet, and he therefore does not know which charge he was convicted of.

15. Mr. Masila, the learned prosecution counsel, opposed the appeal and relied on written submissions filed in Court and dated 16th October 2018. It was stated therein that PW1, PW2, PW3, PW4, PW5, PW6 and PW7 witnessed the robbery, the identification of the Appellants was

by a confession recorded by PW9 and PW11, and which was tested in a trial within a trial and admitted by the trial magistrate in a ruling delivered on 1st December 2016.

16. In addition, that PW8 who was the owner of motorcycle registration number KMDC 809L which was left at the scene of the crime, identified the 1st Appellant as the person who was driving the said motorcycle on 20th March 2015, and the 1st Appellant led the police to the house of the 2nd Appellant, where a phone belonging to PW4 was recovered. Lastly, that the Appellants did not offer any plausible explanations in their defences to dislodge the Prosecution's case.

17. My duty as the first appellate court is to re-evaluate the evidence and draw independent conclusions as held in **Okeno v Republic (1972) E.A. 32**. However, I am alive to the fact that I did not have the advantages enjoyed by the trial court of seeing and hearing the witnesses, as was observed in **Soki v Republic (2004) 2 KLR** 21 and **Kimeu v Republic (2003) 1 KLR 756.**

The Evidence

18. A brief summary of the evidence adduced before the trial court is as follows. The prosecution called fifteen witnesses. Of these witnesses, Ralph Hugh Francis Winter (PW1), Rosemary Mueni Munguti (PW2), Charles Muhiba (PW3), Simon Mutamu Mwawasa (PW4), Catherine Georgia (PW5), Shawn White (PW6), and John Lockhart (PW7) all witnessed the robbery that took place at Nomad Hotel on 20th March 2015 at around 9pm. PW1 who was a director of the Nomad Hotel was informed of the robbery and went to the hotel, fired at the fleeing robbers and witnessed the ensuing shooting.

19. PW2, PW3 and PW5 worked at the Nomad Hotel and were present during the robbery; while PW5, PW6 and PW7 were customers who were present at the said hotel during the robbery, in which money belonging to the hotel and customers' items were stolen. The said witnesses narrated the events of the fateful night.

20. PW8 was Boniface Matheka, the husband of the owner of motorcycle registration No. KMDC 809L, which was one of the motorcycles used by the robbers and which was found at the scene of the robbery after being shot at. His testimony was that the motorcycle used to be driven by the 1st Appellant. His testimony will be analysed later in this judgment.

21. C.I. Daniel Mutisya, who was the Officer Commanding Diani Police Station was PW9, and he produced as exhibit 11 a statement he recorded made by the 1st Appellant, on the said Appellant's participation in the robbery at Nomad Hotel. A statement made by the 2nd Appellant to this effect was also produced as an exhibit by SPP Edwin Kamau (PW11), the County Criminal Investigating Officer of Kwale County after a trial within a trial.

22. PW10 was CI Alex Chirchir, who was based at the Criminal Investigations Department headquarters in Nairobi, and who produced a ballistic examination report of two pistols, two pistol magazines and 14 rounds of ammunition that he received from the Criminal Investigations Department in Diani.

23. Dr. Allan Makoha from Msambweni District Hospital testified as PW12 and produced two postmortem reports of one Alpham Siad and Hamisi Shamhani who had died from gunshot wounds. PW13 was Kennedy Sang, a Clinical Officer as Diani Hospital, who produced a P3 form of injuries sustained by one Clephas Kiptoo Korir who claimed to have been shot by thugs at his workplace on 20th March 2015. PW14 was SP Emmanuel Konde stationed at Diani Police Station, who produced photographs of a mobile phone and ipad recovered at the scene of the robbery, and of a motor vehicle registration KAV 502 L of the security firm that responded to an alarm call from the Nomad Hotel on the night of the robbery, which had bullet holes.

24. The last witness (PW15) was Cpl Anthony Mwanzia, the investigation officer, who gave a detailed account of the events that unfolded from 20th March 2015, when he was the duty officer at Diani Police Station and heard gunshots at the beach road, and thereafter went to Nomad Hotel where the robbery had taken place. He also testified as to having received information on the whereabouts of the 1st Appellant on 10th April 2015, and on the circumstances of the 1st Appellant's arrest .

25. PW15 further testified that based on information received from the 1st Appellant they were then directed to the 2nd Appellant's house, who upon arrest and search was found with a Nokia Phone 2018 which was identified as the one stolen from one of the guards who was guarding Nomad Hotel on the night of the robbery. Further, that they then went to a house where the planning of the robbery was done, and after a shootout, the police killed two people and recovered two guns which had ammunition, 5 phones, two motorcycles, masks and helmets. He produced the phones, masks, helmets, pistols, ammunition, an identification parade form and treatment notes as exhibits.

26. The trial court found that both Appellants had a case to answer and put them on their defence. The 1st Appellant gave sworn testimony, while the 2nd Appellant gave unsworn evidence, and they did not call any witnesses. The 1st Appellant stated that he was arrested at Likoni with motorcycle KMDC 827M on 11th April 2015, and he denied knowing the 2nd Appellant or committing the offences he was charged with. The 2nd Appellant also testified that he was arrested on 11th April 2015 at his place of work at Marikiti market and assaulted, and that he did not know the 1st Appellant. He denied committing the offences he was charged with.

The Determination

27. I have considered the arguments made by the Appellants and the Prosecution, as well as the evidence before the trial court. I find that there are four issues for determination raised in this appeal. The first is whether the charge against the 1st and 2nd Appellants was defective. If the Appellants are found to have been properly charged, the rest of the issues that the court will need to consider are secondly, whether there was a positive identification of the 1st and 2nd Appellants; thirdly, whether there was sufficient, consistent and credible evidence to convict

the 1st and 2nd Appellants for the offences of robbery with violence; and lastly, whether the sentences meted on the Appellants were legal.

Whether the Charge Sheet is Defective

28. On the first issue, the 2nd Appellant submitted that he was charged and convicted of a charge which contained two offences. The Prosecution did not respond to or contest the 2nd Appellant' submissions, and the Court notes that the charges of robbery with violence were indeed brought under sections 295 and 296 (2) of the Penal Code. These charges invoke the rule against duplicity, which provides that the prosecution must not allege the commission of two or more offences in a single charge in a charge-sheet. Such a charge is sometimes said to be 'duplex' or 'duplicitous'.

29. The rule stems from two important principles: firstly, as a matter of fairness, a person charged with a criminal offence is entitled to know the crime that they are alleged to have committed, so they can either prepare and/or present the appropriate defence. Secondly, the court hearing the charge must also know what is alleged so that it can determine the relevant evidence, consider any possible defences and determine the appropriate punishment in the event of a conviction.

30. I am also minded that the law on the framing of charges requires clarity in the charge sheet as stated in various provisions. Section 134 of the Criminal Procedure Code provides that:

> **"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."**

31. Section 135 of the said Code in addition provides as follows:

> **"(1) Any offences, whether felonies or misdemeanours, may be charged together in the same charge or information if the offences charged are founded on the same facts, or are part of a series of offences of the same or a similar character.**
>
> **(2) Where more than one offence is charged in a charge or information, a description of each offences so charged shall be set out in a separate paragraph of the charge or information called a count.**
>
> **(3) Where, before trial, or at any stage of a trial, the court is of the opinion that a person accused may be embarrassed in his defence by reason of being charged with more than one offence in the same charge or information, or that for any other reason it is desirable to direct that the person be tried separately for any one or more offences charged in a charge or information, the court may order a separate trial of any count or counts of that charge or information."**

32. I am also guided on this issue by the decision of a five-judge bench of the Court of Appeal in Joseph **Njuguna Mwaura & 2 Others v Republic [2013] e KLR** ***(Criminal Appeal No 5 of 2008)*** that explained and laid to rest the reasons why charging an accused person with the offence of robbery with violence under sections 295 and 296(2) of the Penal Code would amount to a duplex charge. The said Court, while following its earlier decisions in ***Simon Materu Munialu vs Republic [2007] eKLR (Criminal Appeal 302 of 2005)*** and ***Joseph Onyango Owuor & Cliff Ochieng Oduor v R [2010] eKLR (Criminal Appeal No 353 of 2008),*** stated as follows:

> **"Indeed, as pointed out in *Joseph Onyango Owuor & Cliff Ochieng Oduor v R (Supra)* the standard form of a charge, contained in the Second Schedule of the Criminal Procedure Code sets out the charge of robbery with violence under one provision of law, and that is section 296. We reiterate what has been stated by this Court in various cases before us: the offence of robbery with violence ought to be charged under section 296 (2) of the Penal Code. This is the section that provides the ingredients of the offence which are either the offender is armed with a dangerous weapon, is in the company of others or if he uses any personal violence to any person.**
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> **The offence of robbery with violence is totally different from the offence defined under section 295 of the Penal Code, which provides *that any person who steals anything, and at, or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or to property in order to steal*. It would not be correct to frame a charge for the offence of robbery with violence under section 295 and 296 (2) as this would amount to a duplex charge."**

33. In a later decision by the Court of Appeal in **Paul Katana Njuguna vs Republic (2016) eKLR,** the Court appreciated the defect in charging an accused under both sections, but went further to discuss the effect of that defect. It was held that what court needs to have in mind is whether or not a failure of justice occurs with that defect. So that while it would be undesirable to charge an accused person under both sections, it would not be prejudicial to that accused person if there is no risk of confusion in the mind of an accused as to the charge framed and evidence presented, in which case a charge which may be duplex will not be found to be fatally defective.

34. The Court of Appeal also held in that case that as the offence of robbery with violence includes the elements of the offence of robbery, if the particulars of the charge sheet show the elements of the offence of robbery with violence which are proved, then this is a defect that is not fatal and can be cured by this Court under section 382 of the Criminal Procedure Code.

35. *The converse position therefore, is that if the evidence adduced pursuant to such a charge does not disclose the offence of robbery with violence, then this is a defect that is not curable under section 382 of the Criminal Procedure Code.* This Court will therefore first interrogate the other issues raised of the identification of the Appellants, and whether there was sufficient evidence to convict the Appellants for the offence of robbery with violence, to be able to make a determination as to whether the duplicity in the charge sheet was fatal or not.

Whether there was Positive Identification

36. I*n* ***Maitanyi vs Republic*** **,** ***(1986) KLR 196*** **the** Court set out what constitutes favourable conditions for a correct identification by a sole testifying witness as follows:

> **"Subject to 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 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 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".**

37. I have also reminded myself of the guidelines in the case of **Mwaura v Republic [1987] KLR 645**, in which the Court of Appeal held, *inter alia*, that:

> **"In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light".**

38. Similarly, in the case of ***Wamunga vs. Republic, (1989) KLR 424*** it was held *inter alia* as follows:-

> ***1. Where the only evidence against a defendant is evidence of identification, or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.***
>
> ***2. Recognition may be more reliable than identification of a stranger but mistakes in recognition of close relatives and friends are sometimes made.***

39. In addition, it has been stated by the Court of Appeal in **Anjononi and Others vs Republic, (1976-1980) KLR 1566** that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.

40. In the present appeal, the offences were committed during the night at around 9pm, and none of the witnesses who were present during the robbery identified the 1st and 2nd Appellants. The evidence linking the 1st Appellant to the robbery was made up of circumstantial evidence, namely that he was the one driving the motorcycle registration number KMDC 809L that was found at the scene of the crime, and he had suffered gunshot wounds.

41. I am in this regard guided by the principles that apply before a court can rely on circumstantial evidence as was stated by the Court of Appeal in **Erick Odhiambo Okumu vs Republic (2015) eKLR (Mombasa Criminal Appeal No. 84 of 2012)** as follows:

> ***"It has long been accepted that the guilt of an accused person does not have to be proved by direct evidence alone. Circumstantial evidence, namely evidence that enables a court to deduce a particular fact from circumstances or facts that have been proved, can form as strong a basis for establishing the guilt of an accused person as direct evidence. Indeed, as this Court stated in MUSILI TULO V. REPUBLIC (supra),:***
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> ***'Circumstantial evidence is as good as any evidence if it is properly evaluated and, as is usually put, it can prove a case with the accuracy of mathematics.'***
>
> ***But for circumstantial evidence to form the basis of a conviction, it must satisfy several conditions, which are intended to ensure that the circumstantial evidence unerringly points to the accused person, and to no other person, as the perpetrator of the offence. In ABANGA ALIAS ONYANGO V. REPUBLIC, CR. APP. NO 32 OF 1990 this Court tabulated the conditions as follows:***
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> ***'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.'***
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> ***(See also SAWE V. REPUBLIC [2003] KLR 364 and GMI V. REPUBLIC, CR. APP. NO. 308 OF 2011 (NYERI)).***
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> ***Before a court can draw from circumstantial evidence the inference that the accused is guilty, it must also satisfy itself that there are no other co-existing circumstances, which would weaken or destroy the inference of guilt. (See TEPER V. R. [1952] All ER 480 and MUSOKE V. R [1958] EA 715). In DHALAY SINGH V. REPUBLIC, CR. APP. NO. 10 of 1997 this Court reiterated this principle as follows:***

"For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an accused is entitled to an acquittal."

42. Applying these principles, I note that the evidence by PW8 in this regard was that the said motorcycle was being driven by the 1st Appellant on the material date of the robbery. His evidence was that his wife owned the motor cycle registration number KMDC 809L and another motorcycle registration KMDC 827H, and the 1st Appellant was employed to drive the motorcycles. That the 1st Appellant normally drove motorcycle registration KMDC 827H, but used to arrange with the driver of motor cycle registration number KMDC 809L to exchange the motorcycles.

43. I do not therefore find the evidence by PW8 to have been contradictory as to the 1st Appellant being the driver of motor cycle registration number KMDC 809L on the date of the robbery. In any event the evidence by PW8 that the 1st Appellant could not be found after the date of the robbery was also additional corroboration that he was the one driving the said motorcycle.

44. The Prosecution also submitted that the 1st Appellant did confess to his participation in the offences. The applicable law on confessions is in sections 25, 25A and 26 of the Evidence Act. Section 25 defines a confession thus:

"A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence."

45. Section 25A provides as follows:

"(1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.

(2) The Attorney General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all circumstances where the confession is not made in court."

46. Pursuant to section 25A (2) of the Evidence Act, the Evidence (Out of Court Confessions) Rules, 2009 have been made that provide the procedure and safeguards to be observed in the recording of confessions by the police. Section 26 of the Act renders confessions that are procured by inducement, threat or promise inadmissible as follows:

"A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible in a criminal proceeding if the making of the confession or admission appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him".

47. It was in this respect held by the Court of Appeal in **Kanini Muli v Republic [2014] eKLR** that the overriding duty of the trial court to satisfy itself that the confession was voluntary and was not procured by inducement, threat or promise, and that the rationale for insisting that a confession should be voluntary is to ensure that it is ultimately reliable.

48. The confession by the 1st Appellant was produced as an exhibit in the trial Court and he did not object to its production. He did not bring any evidence of the same not having been voluntary. I have perused the said confessions, and it complied with section 25A of the Evidence Act as it was taken by an Inspector of Police and witnessed by a third party. The 1st Appellant explained his role in the robbery in his confession and that he carried some of the robbers on a motorcycle. This evidence in my view also corroborated the evidence as to his identification.

49. Lastly on the 1st Appellant's identification, the prosecution did produce an exhibit, treatment notes that showed that the injuries he had were gunshot wounds. However, the only relevance of the gunshot wounds were as to the tracing the 1st Appellant, as he had already been identified by PW8. Likewise, it was also therefore not necessary, for the same reason, to call the policemen who effected his arrest in Busia.

50. The identification of the 2nd Appellant was made by the 1st Appellant in his confession. The law on the value of statements made against co-accused in a joint trial is well settled. It was held as follows in **Anyangu & Others vs Republic (1968) EZ 239 at 240** in this respect:

"A statement which does not amount to a confession is only evidence against the maker. If it is a confession and implicates a co-accused, it may, in a joint trial be "taken into consideration" against that co-accused. It is however, not only accomplice evidence but evidence of the 'weakest kind' (Anyona s/o Omolo and Another VR (1953) 20 EACA 318). A statement is not a confession unless it is sufficient by itself to justify the conviction of the person making it of the offence with which he is tried."

51. The confession by the 1st Appellant identifying the 2nd Appellant in the commission of the robbery was therefore accomplice evidence and of the weakest kind, and required corroboration. The 2nd Appellant was in this respect also found with a phone that was stolen during the said robbery that belonged to PW4, who brought evidence of ownership of the said phone during the trial. The doctrine of recent possession

was thus also applicable with respect to the 2nd Appellant and was adequate corroboration of his identification.

52. The doctrine of recent possession is stated in the case of **Malingi vs Republic (1989) KLR 227** as follows:

> **"The doctrine is one of fact. It is a presumption of fact arising under section 119 of the Evidence Act, Cap 80 Laws of Kenya which provides:**
>
> **"The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."**
>
> **So as applies to the offence of theft or handling, recent possession raises a presumption of fact that the one in possession is either the thief or guilty receiver (R – v – Hassan s/o Mohamed (1948) 25 EACA 121). The trial court has the duty to decide whether from the facts and circumstances of the particular case under consideration the accused person either stole the item or was a guilty or innocent receiver. 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 have proved certain basic facts. Firstly that the item he had in his possession had been stolen; it had been stolen a short period prior to the 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 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 item. The doctrine being a presumption of fact 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 it or was a guilty receiver."**

53. The said phone was stolen during the robbery on 20th March 2015 and recovered from the 2nd Appellant upon his arrest on 11th April 2015 after a period of less than one month, which was a relatively recent period. In addition, the 2nd Appellant also recorded a confession which was produced as an exhibit in the trial Court, of his participation in the robbery.

54. The 2nd Appellant retracted the said confession during the trial, and a trial-within-a trial was consequently held, and the said confession found admissible by the trial magistrate in a ruling delivered on 1st December 2016. I have perused the said ruling and confessions and find that the trial magistrate did not err as the said confession did comply with section 25 A of the Evidence Act, and there was no evidence brought by the 2nd Appellant to show that it was not procured voluntarily.

55. I therefore find that there was positive identification of the 1st and 2nd Appellants from the circumstantial evidence adduced in the trial Court, which was also corroborated by their own confessions.

Whether there was Sufficient Evidence to Convict

56. On the issue of whether there was sufficient evidence to convict the Appellant for the offence of robbery with violence, section 296 (2) of the Penal Code provides as follows:

> **"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."**

57. The prosecution must prove theft as **a central element of the offence of robbery with violence, as the offence is basically an aggravated form of theft. The** other elements of the offence of robbery with violence were elaborated by the Court of Appeal in ***Ganzi & 2 Others v Republic*** **[2005] 1 KLR and** in **Johanna Ndungu Vs Republic, Cr. App No. 116 of 2005 (unreported)** as follows:

> **1. If the offender is armed with any dangerous or offensive weapon or instrument, or**
>
> **2. If he is in the company with one or more other person or persons, or**
>
> **3. If at or immediately before or immediately after the time of the robbery, he wounds, beats strikes or uses any other violence to any person.**

58. I am alive in this regard to the requirement that proof of any one of the ingredients of robbery with violence is enough to base a conviction of robbery with violence under section 296 (2) of the Penal Code as was held in **Oluoch vs Republic, (1985) KLR 549**.

59. In the present appeal the robbery was witnessed by PW1, PW2, PW3, PW4, PW5, PW6 and PW7 who gave evidence. The 1st and 2nd Appellants were positively identified as having participated in the robbery as found in the foregoing. Some of the stolen items were recovered near the scene, and one of the stolen items which was a phone, was recovered from the 2nd Appellant. One of the guns used in the robbery was also recovered from accomplices who had been identified by the 2nd Appellant in his confession, and who were killed during the recovery.

60. The Prosecution in this respect produced photographs of the stolen items and a security vehicle with gunshots; the guns and a ballistics report prepared by PW14, and a P3 form of a security guard injured during the robbery as an exhibit. This evidence was sufficient to convict for the charge of robbery with violence, as there was evidence of overwhelming force used during the robbery.

61. I therefore find that the essential elements of the offence of robbery with violence were proved beyond reasonable doubt, and in this regard there was thus no prejudice caused by the duplex charge, which is curable under section 382 of the Criminal Procedure Code.

On Legality of the Sentence

62. As regards the sentence of death imposed on the Appellant, at the time the Appellant was convicted and sentenced, the only sentence prescribed for the offence of robbery with violence was the death penalty. On 14th December 2017, the Supreme Court of Kenya declared that a mandatory death sentence is unconstitutional in **Francis Karioko Muruatetu & Another v Republic SCK Pet. No. 15 OF 2015 [2017] eKLR**.

63. The Supreme Court thereupon gave the following guidance in respect of matters such as the present appeal where the death sentence had been meted as the only applicable sentence:

> **"Remitting the matter back to the High Court for the appropriate sentence seems to be the practice adopted where the mandatory death penalty has been declared unconstitutional. We therefore hold that the appropriate remedy for the petitioners in this case is to remit this matter to the High Court for sentencing. It is prudent for the same Court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners…. In the meantime, existing or intending Petitioners with similar cases ought not approach the Supreme Court directly but await appropriate guidelines for disposal of the same. The Attorney General is directed to urgently set up a framework to deal with sentence re-hearing of cases relating to the mandatory nature of the death sentence - which is similar to that of the petitioners in this case."**

64. As this is an appeal from a lower Court's decision, this Court has two options in line with the aforementioned decision by the Supreme Court. These are to either remit the matter back to the trial court to sentence the Appellant afresh, or to alter the sentence in line with the powers given to this Court upon hearing an appeal, under section 354 of the Criminal Procedure Code.

65. It is my view that it would be more appropriate for this Court to impose the new sentence on the Appellant, so as to avoid parallel appeal proceedings in the event that a new sentence imposed by the subordinate court is appealed in the High Court, and this Court's decision is also appealed in the Court of Appeal.

66. Consequently, I uphold the conviction of the 1st and 2nd Appellants for Counts I, II, III and IV of robbery with violence contrary to section 296(2) of the Penal Code, but set aside the sentence of death imposed on the 1st and 2nd Appellants for each of these convictions. The 1st and 2nd Appellants will accordingly make their plea in mitigation before I consider the appropriate sentence.

67. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 21st DAY OF FEBRUARY 2019.

P. NYAMWEYA

JUDGE

RULING ON SENTENCE

After hearing and considering the 1st and 2nd Appellants mitigation, and after taking into account the time the 1st and 2nd Appellants have spent in custody, I sentence the 1st Appellant and 2nd Appellant each as follows:

1. Seven (7) years imprisonment for the conviction for Count I of of robbery with violence contrary to section 296(2) of the Penal Code.

2. Seven (7) years imprisonment for the conviction for Count II of robbery with violence contrary to section 296(2) of the Penal Code.

3. Seven (7) years imprisonment for the conviction for Count III of of robbery with violence contrary to section 296(2) of the Penal Code.

4. Seven (7) years imprisonment for the conviction for Count IV of robbery with violence contrary to section 296(2) of the Penal Code.

5. The sentences shall run concurrently from the date of this Court's judgment.

Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 21st DAY OF FEBRUARY 2019.

P. NYAMWEYA

JUDGE