REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 169, 170, 171 & 173 OF 2015

PAUL KILYUNGI MALUKI.....1ST APPELLANT

MUTUA NZIOKA.....2ND APPELLANT

JOHN MASILA NZIOKI.....3RD APPELLANT

AGGREY MUKAISI MUSINA.....4TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Milimani Cr. Case No. 229 of 2012 delivered by Hon. L. Mugambi, SPM on 25th September, 2015).

JUDGMENT

1. The 1st, 2nd 3rd, and 4th Appellants (1st, 2nd and 5th accused persons in the charge sheet) were charged together with one other person with 7 counts of robbery with violence contrary to **Section 295** as read together with **Section 296 (2) of the Penal Code**. The particulars of these charges were that on 10th February, 2012 the 5 Appellants broke into R W's residence at Kilimani Estate along George Padmore Road in Kilimani Area Nairobi. They robbed R W and other persons who were in the house the items particularized in the charge sheet, and immediately before, during or immediately after the robbery fatally shot R W. It is further stated that the 5 acted jointly and were armed with dangerous weapons namely pistols.

2. The 1st Appellant was charged with an alternative count of handling stolen property goods contrary to **section 322 (1) and (2) of the Penal Code**. The particulars of this offence were that on 15th February, 2012 at Machakos Bus Park Kamukunji in Nairobi, otherwise than in the course of stealing, dishonestly retained one cellphone Make Nokia knowing or having reason to believe it to be stolen.

3. They pleaded not guilty to the charges. The 4th accused in the lower court was acquitted of the charges. The 1st, 2nd, 3rd and 4th Appellants were convicted in all counts and sentenced to death. The sentence of the 1st Appellant for the offence of being in possession of stolen goods was held in abeyance. They have appealed to this court against both the conviction and sentences. In summary, their appeals were that the lower court erred in convicting them on the basis of insufficient evidence, it erred in failing to find that the prosecution had not proved its case beyond reasonable doubt, and in finding they had been identified as the attackers.

The prosecution case

4. The prosecution called a total of 17 witnesses to prove its case. H T W (**PW5)** testified that at the material time she was employed by R W (hereinafter referred to as the deceased) as her domestic worker. On 10th February, 2012 the deceased came home from work at about 6 pm but had to leave again to retrieve her glasses. **PW5** testified that she opened the gate for the deceased when she came and left because the 3rd Appellant who had been contracted by Spa Security to guard the deceased's premises had not reported for duty. While she was away, the deceased's son D W (**PW1)**, his girlfriend G W M K (**PW6),** and her two cousins J S W **(PW8)** and G W M (**PW10**) came to the house. Their evidence was that after having dinner at Coco J restaurant in Hurlingham they took a taxi to the deceased's premises. Their intention was to get PW1's motor vehicle No. [particulars withheld] so that he could drive them to their respective homes. However they only found **PW5** preparing supper as the deceased had left with this car and decided to wait for her. The deceased returned shortly and retired to her bedroom.

5. **PW5** testified that at about 8.00p.m. or thereabout a man accosted her in the kitchen and placed a pistol on her neck. He ordered her to turn

off the cooker and not to scream and threatened to kill her if she did not comply. Two other men went into the sitting room where **PW1, PW6, PW8** and **PW10** were. They testified that these men came through the kitchen pointing guns at them while signaling them to remain quiet and lay down. They complied with the commands as the robbers threatened to kill them if they resisted. The men commanded **PW6** to take two of the robbers to the deceased's bedroom where she was watching television with her niece M W M (**PW11).** At this time **PW5** was brought to the sitting room by the 3rd man where she remained with **PW1, PW8** and **PW10.**

6. **PW6** and **PW11** who were in the bedroom testified that that they shot the deceased when she could not direct them to the safe. The robbers then proceeded to ransack the house. According to **PW1** they took items worth about Kshs. 1.3-1.4 million which included phones , two HP laptops, cash, and motor vehicle registration number [particulars withheld] which they used as their getaway vehicle. They also raped **PW6, PW8** and **PW10** and beat **PW1 PW5,** and **PW11.**

7. The witnesses testified that the robbers remained in the house up to around 11.00 p.m. before leaving with **PW1's** car. **PW1** managed to untie himself and everyone else in the house. **PW1** sought help from neighbours and took the deceased to Nairobi Hospital where she succumbed to her wounds.

8. **PW16** No. 61789 PC John Kuria who was stationed at the DCIO Kilimani was among the first responders to the scene. Upon receiving the report of the crime, he went to the scene where he found **PW5, PW6, PW8, PW10** and **PW11.**

9. He said that part of his team accompanied the assaulted women to Nairobi Women's Hospital while he went to Nairobi Hospital where the deceased had been taken. He took her clothes, PEX 19-24 and forwarded which he forwarded to the ballistics experts for analysis. He then received the medical treatment notes of **PW6, PW8, PW10** and **PW11** from Nairobi Women's Hospital which he produced as PEX 26-35. At the security guard's office in the premises, he recovered a black jacket which the guard on duty was wearing that night and some food. When the 1st and 2nd Appellants were arrested, blood samples were collected from them which he forwarded for analysis to the government chemist.

10. **PW2** No. 231396 the Deputy Officer in charge of forensic and crime management Nairobi Area took photographs of the deceased's on 14/2/2012 which he produced as PEX 4(a), (b), (c) and (d). Dr. Johnson Oduor (**PW12)** a pathologist and the head of forensic division in the Ministry of Health performed the postmortem on the deceased. His opinion was that she died from chest injuries due to a single gunshot wound from a low velocity firearm.

11. The Appellants were arrested on separate dates. The 1st Appellant was the first suspect to be arrested. No. 710223 Sgt. John Shegu **PW17** was the investigating officer. He stated that the 1st Appellant was arrested after tracking Nokia phone serial number 358824010010090 (PEX7) that had been stolen from **PW5.** The **PW7** No. 60249 Cpl. Henry Kathurina Muongo is attached to Safaricom Security Department. On 11/2/2012 he received a request from DC 10 Makadara to find out the phone number that was paired with IMEI No. [particulars withheld] (PEX7/2), the incoming and outgoing calls from that phone for the period 12/2/2012 to 15/2/2012, the owner and his location. They discovered that the phone was being used by line No. 0701130792 which was not registered. He printed this data which was from 27/1/2012 to 11/2/2012. He prepared a certificate under **section 65 (8) of the Evidence Act** to certify the origin and existence of the data. He produced the DC 10's letter, data and certificate as PEX 7, 8 and 9. He confirmed in cross-examination that the phone number that was paired to the IMEI number was active on 11/2/2012 from 9.40 am. He reaffirmed that this line was not registered to any user.

12. However, **PW17** established from Safaricom Kenya Limited that the line No. 0701130792 was registered to the 1st Appellant. They lured him through PC Momanyi by writing a love message to him. He was arrested on 15/2/2012 within Machakos Country Bus and was found in possession of this phone. They did not recover any of the stolen items after searching the 1st Appellant's house.

13. The 2nd Appellant was arrested on 15/2/2012. When further cross examined, **PW17** stated that the 2nd Appellant was arrested after it was discovered that he communicated with the 1st Appellant constantly both before and after the robbery and because he was implicated by the 1st Appellant. In his earlier testimony **PW17** had stated that he did not get the details of the phone calls and messages that were made or received by the 1st Appellant's number.

14. Like the 2nd Appellant, the 3rd Appellant was arrested on 11/3/2012 at Mathare following from an anonymous tip. He testified that PW1 had described the 3rd Appellant in his initial statement. The 4th Appellant was arrested on 5/6/2012 because he was the guard on duty at the scene of the crime that night and he fled after the robbery. He was positively identified by three witnesses.

15. Only **PW5**'s phone and the motor vehicle that the robbers used to escape were recovered. The Appellants' houses were searched and none of the stole items were found.

Evidence on identification

16. The witnesses recorded three statements on 13/2/2012, 16/2/2012 and 11/3/2012.

17. The witnesses' testimony was consistent that the entire house was well lit with electricity and that the robbers stayed in the house for approximately 3 hours was similar. They also stated that some of robbers were wearing masks and others were not. At certain times during the robbery, they were lying down with their faces to the floor and were covered with blankets. In their testimony they all stated that they were able to identify some of the robbers but they did not give their descriptions to the police and were not involved in the arrest of the suspects.

18. On his part, **PW1** testified that he saw a total of five men in navy blue pants and boots which looked like those that are worn by the police. They were all armed with pistols wearing navy blue pants. One man was wearing a suit , two others *'had the patched sweaters that*

are commonly worn by security guards' and the third only had a shirt on.

19. He stated that he identified the 1st Appellant by his height, eyes, complexion and body size. He stated that the 1st Appellant was approximately his height and was wearing a suit. He also recalled that he had a mark on his forehead. His description of the 2nd Appellant was that he was *'heavy set and dark'* and was wearing a black shirt. He said that he was able to clearly observe both the 1st and 2nd Appellants when he was lifted up by his collar. The 2nd Appellant was the one guarding him in the sitting room. It is the 3rd Appellant who lifted him by the collar, hit him with the butt of his pistol and shot his mother. He noticed that this man persistently cleared his throat and fidgeting with his trousers' zip.

20. The 4th Appellant was wearing a black jacket on the material night and he noticed him wiping his shoes in the deceased's bedroom. He eventually wore a stocking but the witness could still recall his eyes. **PW1** stated that he knew the 5th Appellant well. He was on duty on the material night. He recalled that he opened the gate for the taxi and remembered that he had noted his failure to inspect and intended to reprimand him the following day.

22. **PW5** testified that she saw a total of three men and was able to identify two of them. She stated that the man who attacked her in the kitchen was light skinned with dark hair. He was wearing a dark top, black trousers and black shoes. She could not identify this man at any of the identification parades but stated at the witness stand that she thinks the man may be the 4th accused (he was acquitted). She only observed this man for less than a minute before being ordered to bow down.

23. She identified a man of fair complexion with a scar next to his eye who passed by her at the kitchen on his way to the sitting room. This is the 1st Appellant and she positively pointed him out at the identification parade. She had not given this description to the police earlier as she only remembered it when she saw him at the identification parade.

24. She did not identify the 2nd or 3rd Appellants. However, she knew the 4th Appellant well prior to the incident. It was her duty to let in the security guards when they reported and to serve them supper. The 4th Appellant had worked at the deceased's premises for about a week. She did not recall seeing him in the house during the incident but she noted that he did not come to their aid and ran away with the thugs. She testified that she did not see what the robbers were doing as she had been ordered to lie down on the floor and later was covered on the bed with a blanket.

25. **PW6** saw four men enter into the sitting room before she was ordered to lie down. She identified the 2nd Appellant because he was big and he was the first to enter the room. He is the man that ordered them to lie down. She also identified the 1st Appellant by the scar on his upper lip and on the back of his head. She could not identify the 3rd and 4th Appellants or the 4th accused.

26. **PW8** described the man who ordered them to lie down as a 5.5 ft. tall man with a gap between his front teeth which she saw when he spoke to them. She described the 2nd Appellant *'light skinned fat man'* who she saw at the stairs as she was being led upstairs. She picked him out of the identification parade, because of his weight. She identified the 1st Appellant due to a mark on his face. She saw him when he came into the room where she was being raped and spoke to her rapist for about 5 minutes. The man who raped her had a gap in his teeth but she did not see him at any of the parades.

27. **PW10** recalled that the 2nd Appellant is the man who brought **PW5** into the sitting room. He is also the one who raped her. During both times, he had not covered his face. She did not identify the 1st, 3rd or 4th Appellants.

28. **PW11** testified that she looked at the dark fat unmasked man, the 2nd Appellant. She also saw the 1st Appellant who she described as of light complexion with a visible scar on his cheek and a third *'fat* man'. **PW11** stated that she did see the 3rd Appellant in the deceased's bedroom, and he pointed a gun at her but she did not attend the identification parade. She knew the 4th Appellant well before the incident but she did not see him during the robbery.

The identification parades

29. There were three separate identification parades that were conducted. The first was conducted on 15/2/2012 at Kamukunji Police Station by No. 231293 CI Bernard Chepkwony (**PW13).** The 2nd Appellant was the suspect. He was positively identified by **PW1, PW8** and **PW11. PW10** pointed out two men including the 2nd Appellant. **PW5** identified another person.

30. The 2nd identification parade was for the 1st Appellant and it was conducted by No. 230697 I.P. Peter Jaraga **(PW14).** At his request, his friend F K K was present during the identification and both the accused and his friend signed the parade form. The people selected for the parade were of the same complexion, height and build as the accused. The suspect chose to have the parade conducted bare foot. **PW1, PW5, PW6, PW8, PW10** and **PW11** identified the 1st Appellant. The 1st Appellant and his friend were satisfied with the manner in which the parade was conducted and both signed the form.

31. The 3rd identification parade was conducted by **PW4,** No. 43632 Ag. I.P. Lucy Ndungu. The 4th Appellant was the suspect. There were 7 members in this parade all of the same height as the 4th Appellant. He was positively identified by **PW1** and **PW5.** The 4th Appellant did not object to the parade and was satisfied with the manner it was conducted.

The Appellants' defences

32. The 1st Appellant was **DW1**. He elected to give sworn testimony. He testified that on 12/2/2012 he together with some passengers who had alighted from a public service vehicle, were walking along Kariokor roundabout when they came across a phone. He was arrested on 13/2/2012 when he went to surrender the phone to a Mr. Njoroge with whom he had spoken on the phone. It was his testimony that he sustained the scars on his face and head after being beaten by the police. He denied that he is the owner of mobile number 0701130792 which is alleged to have been inserted in PW's stolen phone and maintained that his number is 0700662719.

33. **DW2**, the 2nd Appellant testified that he works as a clerk who issues tickets for public service vehicles plying along route 148 Nairobi. He was arrested on 14/2/2012 and taken to Pangani Flying Squad Offices.

34. He stated that while he participated in the parade, his face was swollen from the beatings by the police. None of the other members in the parade had similar injuries. In addition, his photograph was taken moments before the parade was conducted. He confirmed during cross examination that he signed the form stating that he was satisfied with the way it was conducted.

35. It was his testimony that he did not participate in the robbery as during that period, from 7-10th February, 2012, he was involved in funeral arrangements for his neighbour's wife. He called **DW3** as a witness to corroborate this fact. DW3 testified that on 10/2/2012, he the 2nd Appellant and other fourteen people were in a meeting organizing the burial of a neighbour's wife. He said that the 1st Appellant arrived for the meeting at about 7.15 p.m. and stayed until it was concluded at 10.00 pm. DW4 who was also in that meeting testified that the 2nd Appellant was with them until 10 p.m.

36. The 3rd Appellant also gave sworn testimony. He testified that he operates a taxi business and also owns a bar. He said that he was arrested and booked on 10/2/2012 following an altercation with a police officer who had drinks in his bar but refused to pay. His arrest was an act of vengeance by the officer with whom he fought.

37. The 4th Appellant testified that he reported the deceased's house on the material day where he had been contracted as a security guard by Spa Security. He however denied committing the offence. He stated that his employment was terminated that day after **PW5** reported that he had not reported to work on time. He denied that he was in the premises during the robbery.

Submissions

38. Each Appellant filed his own submissions. The 1st and 3rd Appellants submitted on the same ground that the charge sheet was duplex because it charged them under sections 295 and 296 (2) which sections create separate offences.

39**.** The 1st Appellant in addition argued that he was not identified at the scene of the robbery. The circumstantial evidence that the lower court relied on to convict him was insufficient to support a conviction. He also argued there was variance between the charge and the evidence. He submitted that whereas a number of witnesses made reference to rape being committed during the fateful night such charges were not preferred against the Appellants. Further, that while the particulars of the charge allege that pistols were used during the incident no evidence of the use of said pistols was adduced before the court and that results on the investigation of the firearm used in the incident was never produced. He submitted that Section 23 of the Kenya Police Force Standing Orders gives clear guidance on investigations in incidents where arms and ammunition are used to commit a crime.

40. He then submitted that identification evidence needs to be watertight but that in the present case it was clear that none of the witnesses described their attackers in their first reports to the police. He relied on **Terekali & another *v.* Rex[1952] 19 EACA 259** to set out the importance of a first report. That an analysis of the identification parades carried out by the witnesses gave a clear indication that the witnesses gave disastrous results but the trial court still sided with them. He submitted that PW1 testified that he made a further statement on 16th February, 2012 which was the date when the Appellant was charged which raised questions about the witness affirming the identity of the Appellant in court. He submitted that the conduct of the parade and his subsequent identification did not meet the threshold required. He pointed to the fact that PW11 testified that they were kept in the same room before the parade which could give rise to the possibility of consultation.

41. He then questioned the application of the doctrine of recent possession in the present case. He submitted that he was found in possession of a mobile phone belonging to PW5 whereas the line found in the phone could not be traced to him. Whilst relying on **Charles Matu Mburu *v.* Republic[2014] Eklr,** he submitted that the evidence from Safaricom mobile phone subscriber should have been admitted in accordance with **Section 65(8) of the Evidence Act**. Further, that there was no proof of ownership of the phone other than a mere statement that that it was his phone.

42. He then submitted that the evaluation of evidence was devoid of critical analysis which amounted to abdication of legal and constitutional duty on the part of the trial magistrate. He pointed to issues that were ignored by the court including the request of blood samples from some Appellants, the failure to analyse the bullet recovered from the deceased's body, the failure to track the other mobile phones stolen and the allegations of torture by some of the Appellants.

43. The 2nd Appellant submitted that the witnesses could not properly identify their assailants under the circumstances of the robbery. The witnesses said that they were assaulted and threatened with pistols hence it is possible that their focus was on the weapon rather than trying to identify the perpetrators. He faulted the trial court for failing to consider the circumstances under which the witnesses made the observations. He also took issue with the fact the witnesses who purportedly identified him in the parade did not give a description of their assailants, casting doubt as to how they picked him in the parade. Accordingly, he was of the view that his identification was dock identification which the court could not rely upon. This, he urged, called upon the trial court to test with the greatest care the evidence of identification. He insisted that he was innocent and that his alibi defence ought to have set him free.

44. The 3rd Appellant also submitted that **Section 200(3) of the Criminal Procedure Code** was infringed. He submitted that happened after

Ho. Mugambi took over the conduct of the trial from Hon. Ndwiga.

45. He argued that the trial court proceedings were entirely vitiated by the trial magistrate failing to seek his consent to file written submissions. He submitted that although he was represented by counsel, there was a danger in advocates taking short cuts to finalize a matter, a procedure that compromises justice.

46. On identification he submitted that PW1 and other witnesses failed to give descriptions of their assailants when they made their initial reports. Further that their statements were recorded after his arrest and there were material discrepancies among the witnesses about the number of robbers who struck which cast doubt as to whether they were in a position to identify the robbers. Furthermore, since the robbery took place at night the circumstances of a positive identification were not prevailing. He submitted that the evidence of the witnesses was contradictory and pointed to lack of certainty about how many robbers were masked and so who amongst them was identified. He also faulted the identification parade as the witness confirmed to having seen him before the parade. Additionally, PW17 who told the court that he had given the names of the suspects to the witness.

47. He added a voice to the fact that there was variance of evidence against the charges as no evidence supported the assertions that some of the witnesses were raped.

48. He further argued that his arrest was shrouded in mystery, raising further doubt as to whether he was linked to the robbery. He assertion that he was arrested on 10th March, 2012 which was confirmed by Occurrence Book entry 69 of the same day at Pangani Police Station but the officers who arrested him were never called as witnesses. That further, the investigating officer contradicted the record by submitting that he was the one who booked the Appellant at the police station on 11th March, 2012.

49. As regards identification, he questioned why he was charged yet none of the prosecution witnesses saw him during the robbery. He strongly argued that although he was convicted purely based on circumstantial evidence, no evidence was adduced to the effect that he disappeared from the scene because he was linked to the robbery. After all, he was arrested while doing a new job and not hiding. He argued that the trial court should have considered his defence that he was relieved of his duties by his supervisor at the compound but did not abscond duty and how he was arrested. He therefore not abscond duty.

50. State counsel opposed the appeal. On the ground of duplicity of charges, he submitted that the Appellants were well aware of the charges against them. This defect is curable under section 382 of the Criminal Procedure Code. On the ground of variation of the charges with the evidence, counsel submitted that the fact that those witnesses were raped were not examined by the police doctor did not negate the fact of rape. In addition, the Appellants were charged with robbery with violence and not rape. It was his submission that the credibility of the witnesses was not tainted because they refused to be examined.

51. Counsel submitted that the Section 200 of the Criminal Procedure Code was fully complied with. The identification parades were done in compliance with the Police Standing Orders. The same were conducted only three days after the robbery when the events were still fresh in the minds of the witnesses. The 1st, 2nd and 3rd Appellants were placed at the scene and their roles clearly stated by the witnesses. The trial court noted the scar that was used by the witnesses to identify the 1st Appellant.

52. Relying on the case of **Nathan Kamau Mugwe v R Court of Appeal Criminal Appeal No. 63 of 2008** counsel submitted that the fact that the witnesses were not describe their attackers in the first instance does not take away the opportunity to identify them in an identification parade. It was his submission that all the Appellants were properly identified and he urged the court to uphold their convictions.

Analysis

53. This court is alive to its duty as the first appellate court to analyse and re-evaluate the evidence afresh to arrive at its own independent findings and in doing so, bearing in mind that it did not have the opportunity to observe the demeanor of the witnesses. See **Njoroge v Republic (1987) KLR, 19 & Okeno v Republic (1972) E.A, 32.**

54. The issues raised for determination in this appeal are: whether the charge sheet was defective for being duplex, whether the evidence was in variance with the charges, whether the Appellants' rights under Section 200 of the Criminal Procedure Code were contravened, whether the Appellants were properly identified as the culprits and whether the prosecution proved its case beyond reasonable doubt.

(a) Whether the charges against the Appellants were defective for being duplicity

55. Under this ground the Appellants argued that the charge sheet was incurably defective because it was framed as "contrary to section 295 as read together with section 296 (2) of the Penal Code. The Court of Appeal in **Paul Katana Njuguna v Republic [2016] eKLR** faced with a similar issue extensively considered whether such a charge sheet is defective and its effect and analysed some of the decisions that have laid the law on the issue including those cited by the Appellants: **Joseph Njuguna Mwaura & 2 Others** (supra) and **Simon Materu Munialu** (supra).

56. The court held that there is no offence known as robbery with violence under section 295 or 296. It held that:

> ***"Thus, Section 296 of the Penal Code has two provisions. This is subsection (1) that is a penal provision providing the sentence for the felony of robbery; and subsection (2) that creates the offence of aggravated robbery and provides a stiffer penalty of capital punishment. Neither Section 295 nor Section 296 refers to an offence of "robbery with violence". Indeed, the felony termed robbery as described under Section 295 of the Penal Code may involve use of actual violence or threat to use violence, while the aggravated offence of robbery as described under Section 296 (2) of the Penal Code may be complete with use of***

violence or no use of violence as long as there has been a theft and the offenders are either armed with offensive weapons or offenders are more than one*. …..*

We appreciate that Section 296 (2) of the Penal Code creates the offence of robbery with violence or aggravated robbery. In our view, the offence of robbery must first be demonstrated before proceeding to demonstrate the ingredients provided in Section 296 (2) of the Penal Code. As a corollary to this proposition, an accused person facing those charges would in defence seek to demonstrate that no offence of robbery was committed and that the ingredients alleged under Section 296 (2) were absent or were not demonstrated by the prosecution."

57. The court held that such a defect is not fatally defective. It summarized the purpose of the rule against duplicity as follows:

"As we have already noted the rule against duplicity is to enable an accused know the case has to meet. We accept as the correct position in law that uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed. If there is no risk of confusion in the mind of the accused as to the charge framed and evidence presented, a charge which may be duplex will not be found to be fatally defective."

58. The issue which a court has to consider is whether the same had prejudiced the Appellants in any way. It is noted from the record that the Appellants fully participated in the trial and cross-examined the witnesses. A perusal of the cross–examination reveals that the same was conducted in a manner that showed the Appellants understood the charge they faced. They did not allege during trial that they were unable to understand the charges because they were imprecise as submitted. This ground of appeal fails.

(b) Variance between the charge and evidence

59. The Appellant argued that there was variance between the charge and the evidence that was adduced because the witnesses led evidence to the fact that they were raped by the Appellants yet they had been charged with robbery with violence not rape. From the evidence it emerged that in the course of committing robbery, the robbers committed other offences including rape and murder. The three offences are distinct each carrying its own ingredients. However, as they occurred against the same complainants, by the same assailants and in the course of the same transaction it is therefore expected that the evidence on the circumstances of the three offences and the perpetrators is similar.

60. As they were narrating of the sequence of events from the moment they were attacked by the robbers to when they left, they inevitably testified about the rape that occurred during the robbery. This evidence of rape did not contradict the charges of robbery with violence nor was it material that the same supported another charge.

61. The Appellants also faulted the prosecution for failing to produce material evidence that was collected. They argued that the prosecution did not produce two medical reports that were marked for identification: MFI 6a and MFI 12. The bullet that was extracted from the deceased's body by **PW12** and the pistols that were used during the robbery were not produced. Relying on the court of appeal decision in **Daniel Muthoni M'arimi v Republic [2013] eKLR** counsel argued that the failure to produce the dangerous weapon that was used during the robbery was fatal to the charges. It was his submission that at the very least the bullet that was recovered should have been analysed so as to determine the weapon that was used.

62. **Section 296 (2) of the Penal Code** creates the offence of robbery with violence as follows-

63. The disjunctive word 'or' is used in this section to mean that the offence is complete if either of the elements is proved: namely the offender is armed with a dangerous weapon, if he is in the company of more than one person, or if he uses violence during the robbery. Although the witnesses differed on the number of men that attacked them that night, their evidence was similar that there was more than one man in the house. The witnesses said that violence was used against them. **PW1** was hit with the butt of a gun, **PW5** testified that she was beaten, **PW6, PW8,** and **PW10** were raped, and the deceased was shot. These two grounds are sufficient separately to support the offence of robbery with violence.

64. Failure to produce the gun that was used in the robbery or to examine the bullet that was extracted from the deceased was not fatal to the prosecution case. Counsel relied on the case of **Daniel Muthoni M'arimi v Republic (supra)** to argue that the weapon that was allegedly used must be produced. However, this was a misinterpretation of the decision. What the court found was that there was no evidence led by the prosecution that the weapons alleged in the charge sheet were used during the commission of the offence or that they even existed. The complainant did not even refer to these weapons in his testimony. It is not mandatory to produce the weapon that was used during the robbery.

65. The court may rely on the evidence of the witnesses if it finds that such evidence is credible as is in this case. The witnesses all stated that they were threatened with pistols. In addition the deceased was shot during the robbery and a bullet was extracted from her body.

66. The investigating officer also collected blood samples and finger prints which were to be analysed against the samples collected from the women that were raped. **PW16** informed the court that the samples were forwarded to the government chemist for analysis and the Appellant produced as evidence the DNA results that were received from the prosecution following an order of court.

67. The record shows that a DNA test was conducted by **PW16** comparing the samples collected from the witnesses that were raped and the 1st Appellant for comparison by order of the court. However, these results were not produced in evidence after the prosecution's objection, which was upheld, that the 1st Appellant could not produce the same as he was not the maker and he did not cross examine the maker **PW16.** This ground is addressed in later in this opinion.

(c) Whether Section 200 of the Criminal Procedure Code was contravened.

68. Hon. P.M Ndwiga heard the prosecution case and delivered the ruling on whether the prosecution had established a prima facie case sufficient to place the accused persons on their defence. However, the defence case was heard by a different magistrate as the original magistrate was not available. At page 229 of the proceedings, the court informed the accused persons of their right under **Section 200 (3)** as follows-

> ***"This case is partly heard before my predecessor, Hon. Peter Ndwiga, pursuant to section 200 of the Criminal Procedure Code, the law requires that whenever a magistrate who has been hearing a matter ceases to exercise jurisdiction either by reason of transfer or otherwise, the succeeding magistrate should inform the accused persons that they have a right to demand that witness who had testified be recalled or they can choose to proceed with the case from the point it has reached"***

69. The 3rd Appellant argument is that this provision was contravened against him as the question was not posed to him, and he was not given an opportunity to answer personally, instead the response was given by counsel on record at the time, Mr. Uvyu. This argument is not supported by the record. The record shows that each accused person responded and elected to proceed with the case. Mr. Uvyu for the 3rd Appellant, who was in court that day, confirmed his client's position. In fact all the accused persons elected to proceed with the defence hearing on that day even before the proceedings were typed.

70. I find that there is no merit to this ground of appeal.

(d) <u>Whether the Appellants were properly identified</u>

71. Save for the 4th Appellant, the robbers were strangers to the witnesses and they were not arrested at the scene of the robbery. Therefore, whether the Appellants were ably identified as the assailants is critical to the prosecution case. In **<u>Wamunga v Republic [1989] KLR 429</u>** the Court of Appeal held 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 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."***

72. The court must satisfy itself that in all circumstances it is safe to act on such identification and that the identification was free from error and there wasn't mistaken identity particularly when the circumstances of identification were difficult.

73. The first test is the circumstances under which the witnesses observed the suspects. The witnesses testified that the entire scene where the robbery occurred was well lit with electricity. However, the circumstances that prevailed during the attack were especially brutal and quite difficult. The witnesses were beaten, some raped and one shot. During the entire ordeal they were threatened with pistols. In addition, although the robbers stayed in the house for about three hours, the witnesses did not observe them throughout this period. They testified that they covered with blanket or lying with their faces down for a significant portion of the time the robbers were in the house. They were only able to see them during short periods when being spoken to, as they were being led to other rooms in the house or while being assaulted. Further, some of the robbers were wearing masks. Therefore, the court must examine the evidence with great care and be certain that the witnesses were able to properly observe their attackers and could positively identify them.

74. The second test is whether the witnesses were able to describe their assailants to the police. In **<u>Simiyu v R [2005] 1 KLR 193</u>** the court held that-

> ***"in every case in which there is a question as to the identity of an accused, the fact of there having been a description and the terms of that description are matters of highest importance of which evidence ought to be given by the person or persons to whom the description was given."***

75. None of the witnesses gave descriptions of their assailants when they recorded their statements on 11/2/2012. The evidence shows that the Appellants were arrested following the independent investigations of the police. The 1st Appellant was arrested because he was found in possession of **PW5**'s phone and the 2nd Appellant was arrested because he was communicated with the 1st Appellant before and after the robbery. The 3rd Appellant was arrested from information received from an anonymous tip. They however identified them in the identification parades that were conducted subsequently.

76. Their identification being not preceded by a description of the suspects is therefore dock identification which is generally regarded as unreliable. This was the holding in **<u>James Tinega Omwenga v Republic [2014] eKLR</u>** where the court stated-

> "***The law is settled that in general, identification of a suspect who was a stranger at the time the offence was committed, which was not followed by the witness describing the suspect to the police who would then organize a properly conducted identification parade at which the witness is afforded an opportunity to affirm his identification by pointing out the suspect, is a dock identification which is at times regarded as worthless"***

77. The prior description of suspects ensures that the identification parade that is conducted by the police is fair and to confirm that the witnesses can identify the suspects. As was evident in this case the witnesses' non-disclosure, the 1st and 2nd Appellants were placed in a parade with other people who did not bear their identifying marks to their disadvantage. The witnesses stated that only the 1st Appellant had a mark and the 2nd Appellant was the biggest among the men in the parade. Accordingly the persons in the identification parade were not similar to the Appellants. This contravened Chapter 46 of the Force Standing Orders at 6 (iv) (d) which provides that-

'The accused/suspected person will be placed among at least 8 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."

78. For the above reasons, I find that the identification parades were not credible and cannot on their own be sufficient to sustain a conviction and it must be corroborated by other evidence. Failure to give a prior description of the suspects cast doubt as to whether the witnesses were able to observe them and get accurate impressions of their attributes. All the witnesses who identified the 1st Appellant in the identification parade solely on the basis of the mark on his forehead. In fact, **PW5** testified that she only remembered that one of her attackers had a scar when she saw it on the 1st Appellant at the parade. They were adamant that they saw him and remembered his scar. However, the question is, if this feature was so distinct why did they not mention it in their statements? I therefore find that their description of the 1st Appellant was not watertight. I am guided by the Court of Appeal's decision in **Matianyi v Republic [1986] KLR 198** where it held-

"If a witness receives a strong impression of the features of the assailant, the witness will usually be able to give some description. If on the other hand the witness says that he or she could not identify or recognize the person, then a later identification or recognition is suspect, unless explained."

79. The 1st Appellant was also convicted by the lower court on the basis that he was found in possession of PW5's phone that had been stolen during the robbery. The prosecution in this case relied on the doctrine of recent possession to show that the 1st Appellant was in possession of the stolen phone because he was among the persons who robbed him. The doctrine was elucidated in **Isaac Ng'ang'a v Republic [2006] eKLR** as follows-

"it is trite that before a court 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; the 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 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 item, and in our view discredited evidence on the same cannot suffice no matter from how many witnesses."

80. The 1st Appellant admitted that he was found in possession of the phone which **PW5** positively identified was stolen from her and he admitted that he collected it on the morning following the robbery.

81. I further note that **PW17** stated that they monitored the phone calls and messages that were made by the 1st Appellant using **PW5**'s number and this is one of the ways that they the identified that the 2nd Appellant was one of the robbers. However, the records were not produced as evidence. The evidence would have provided a crucial link between the 1st and 2nd Appellants.

82. Be that as it may, the mobile phone was positively identified by PW5. It is trite that the evidence from Safaricom Mobile phone subscribed adduced by PW7 did not disclose who the sim card found in the phone belonged to. He produced the data print pout showing that the sim card was unregistered. And so, it would be difficult to link the sim card to the 1st Appellant.

83. Be that as it may, the said sim card was inserted in the mobile phone on 11th February, 2012 at 9.40 a.m. the same date the 1st Appellant stated he collected the phone on his way to work. He said he collected at about 5.00 a.m. He was lured to the police station three days after the robbery when he was found in possession of the same phone. It is doubtful that it was a coincidence that he found himself with a phone stolen only hours after the incident. It is true that a mobile phone is a fluid item that can move from hand to hand very fast. However, the time within which the 1st Appellant got hold of it leaves no doubt in my mind that he had a hand in the robbery.

84. PW2, PW5,6,8,10 and 11 all claimed they identified him in the identification parade. Each of them stated that they singled him with a scar he had on the face. Starting with PW1, he stated that the scar was on the forehead. PW5 testified that she identified the 1st Appellant who had a scar next to his eye which she clarified in cross examination was on the left side of his forehead and that the other members of the parade did not have a mark like that one. PW6 testified that she identified the 1st Appellant who had a scar on the upper lip although the location of the scar is in contention in the cross examination where she testified she noticed the scar, at the back of his head, once the members of the parade turned around. PW8 testified that she too took part at a parade at Kamukunji Police Station where she identified the 1st Appellant who had a mark on his face although she could not recall where the mark in question was. PW11 testified that she took part in a parade in which she identified the 1st Appellant who had a scar on his face. The court did note that she could not see the scar from the witness stand and had to move closer to the dock to identify the scar which was on his forehead.

85. 73. The scar in question would clearly fall within Order 6 (iv)(d) set out above if it was readily apparent and relied upon for positive identification. The officer who carried out the parade testified that he met the 1st Appellant and informed him of the parade in question whereupon the Appellant chose to have his friend present, one K K. That he then found 9 members for the parade who he introduced to the 1st Appellant at the parade. He recorded the Appellant's remark after the parade which were in Kiswahili, to wit: "*Nimefurahia vile parade imeendelea hata rafiki yangu K alikuweko na akashuhudia"*. The Appellant signed the parade forms in question.

86. Of importance is that if the 1st Appellant had an identifiable mark through which the witnesses identified him, it was the duty of the parade officer to ensure that other members of the parade had scar so as to lessen the conspicuousness of the scar on the Appellant's face as provided under Order (d). This was not the case which called into question the credibility of the parade. Besides none of the witnesses had earlier said they had a robber with a scar on the face, the bases on which the parade would have been conducted.

87. The Court of Appeal in the case of **Boniface Ikuha Adiagala & 2 others vs Republic [2016] eKLR** delivered itself thus;

> ***"On the issue of identification parades, rule 6 (iv)(d) of standing orders made under the Police Act provides that:***
>
> > *'the accused/suspected persons will be among at least eight persons as for 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'*
>
> ***… the police should have taken steps to ensure that the disfigurement of the Appellants' arm was not especially apparent. In any event, R had not given a description of the Appellant and as was stated in Ajode vs Republic (Supra) the identification parade was not properly conducted because the witness was not asked to give a description of the Appellant to the police before the parade was mounted.***

88. In the present case, the witnesses recorded statements about the presence of the scar after the parade, which amounted to couched evidence. It is my view that the parade officer ought to have enquired from the witnesses how they would have identified the suspect before the parade was conducted. I am unable to conclude that the identification through the scar was full proof link to the offence.

89. However, on account of the doctrine of recent possession, the 1st Appellant having been found in possession of PW2''2 mobile phone, I have no doubt in my mind that he had in the robbery. I find that the conviction in his respect was safe.

90. The 2nd Appellant was identified primarily due to his weight. **PW1, PW6, PW8** and **PW11** all described him as 'fat/ or heavy set'. However, **PW1** only saw him when he was lifted up. **PW6** and **PW11** saw him at the stairs as they were being led to the room where they were raped. This was clearly not sufficient time to observe him as they could not identify other features other than he was overweight and his complexion. I also find that this description is extremely vague falls below the threshold required to prove that the identity of the 2nd Appellant beyond reasonable doubt.

91. As stated above, **PW17** testified that they arrested the 2nd Appellant because he was in constant communication with the 1st Appellant both before and during the robbery. However no evidence was produced to prove this fact. I therefore find that the lower court erred in convicting the 2nd Appellant.

92. The 3rd Appellant was identified by **PW1** and **PW11.** He stated that this is the man that lifted him up by the collar and hit him with the butt of his pistol. He also observed that he was consistently fidgeting with his trousers' zip. **PW11** reiterated that the 3rd Appellant was among the robbers but she did not attend his identification parade nor did she give any description to the police. Therefore the evidence of PW1 was not corroborated. In addition **PW17** did not adduce evidence on how he determined that the 3rd Appellant was a suspect noting that there was no description from the witnesses on which he could act. His testimony that he was informed by an anonymous source is not acceptable because then it denies the Appellant the right to confront his accuser. Upon receiving this information, he ought to have carried out further investigations to obtain suitable evidence. I find that this evidence was unreliable and insufficient to identify the 3rd Appellant.

93. The identification of the 4th Appellant in this case was sound. **PW1, PW5** and **PW11** all knew him well before the incident. He had been employed to guard the deceased's premises and he was on duty on the material night. However none of the witnesses saw him during the robbery. **PW17** testified that he was arrested and charged because he fled with the robbers and this created an impression that he acting in concert with them. The court found this act incriminating and that the circumstantial evidence against him was overwhelming and accordingly convicted him.

94. The principles on the application of circumstantial evidence are now well settled by the Court of Appeal. In the case of **Peter Obero Anotther V Republic [2011]eKLR**, the court delivered itself thus:

> ***"It is the essence of circumstantial evidence that, in order to justify an inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis that that of guilt. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference – TEPER V R[1952] AC 480. With those safeguards in place, circumstantial evidence is as good as any direct evidence which is tendered and accepted to prove a fact. In R V. TAYLOR, WEAVER AND DONOVAN [1928] 21 Cr. App. 20 CA the court stated:-***
>
> > ***"Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by undersigned coincidence, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial."***

95. In the present case, the Appellant was linked to the offence on account of his disappearance soon after the offence. The Appellant disappeared soon after the offence when just before the robbery he had opened the gate for PW1 and PW5 thereafter served him with food. It later turned out that he did not eat the food that was found at the sentry after the situation calmed down. His duty was to provide security to the home. He was arrested several months later, on 5th June, 2012, not by surrendering himself but by apprehension. In the case of **Republic *v.* Boniface Gathege Wacheke[2010] eKLR** in the High Court at Nyeri, the then learned Makhandia, J. held as follows:

> ***"As was held in the case of Malowa v. Republic[1980] KLR 110 when an accused person disappears after an offence has been committed, the fact of his disappearance can lead the court to an inference that the accused disappeared to escape being arrested***

for committing the offence. I would hold the same of the accused for the circumstances of this case. He knew he was being accused of killing the deceased going by the screams of the lady at the gate. Instead of going to the nearest police station to set the record straight he disappeared to Molo, very far away from the scene of crime."

96. Referring to the case of **Malowa**(ibid) Kimaru J. in **Republic *v.* Lchkitin Leswakeri[2006] eKLR**, stated as follows:

> ***"In the case of Malowa v Republic[1980] KLR 110 where the Appellant had disappeared from his home for six months after committing the offence, the Court of Appeal held that his conduct, his disappearance from his home and remaining absent from his home for 6 months, was a piece of circumstantial evidence which corroborated the deceased dying declaration."***

97. The judge accordingly found that the deceased having disappeared soon after stabbing the police instead of surrendering to the police gave an inference that he was guilty. In the present case as earlier observed, the 4th Appellant's duty was first and foremost to ensure the security of the homestead and its occupiers. The robbers struck after the deceased came into the compound. The 4th Appellant had earlier opened the gate for PW1 and had also been served food by PW5. After the robbers struck he obviously knew all was not well in the homestead. His first obligation was to raise alarm. In lieu of the alarm owing to circumstances, he was obligated to report to the police about the robbery. None of these events obtained from him. Instead, he turned an enemy not only by fleeing the scene but disappearing for months and subsequently not reporting the matter to the police. It cannot be had then that he was an innocent victim of circumstances. It must be that he had a hand in the manner the robbers accessed the compound through aiding them which is as good as being a robber himself. I have no doubt in my mind therefore that he was not an innocent person and his conviction on all the counts of robbery with violence was correct. The circumstantial evidence clearly draws an inference of guilt.

Conclusion

98. From the foregoing, it is my finding that the lower court did not test the evidence with the greatest care with respect to the 2nd and 3rd Appellants. I am not satisfied they were properly identified. I note that, save for the 1st Appellant, the descriptions of the other 2nd and 3rd Appellants were vague: on the basis of complexion, size, or clothes. Their evidence on identification was not watertight and I entertained doubt as to whether they were able to observe their assailants. I quash their conviction, set aside the death sentences and order that the two Appellant be forthwith set free unless otherwise lawfully held.

99. I however arrive at a finding that the 1st Appellant was properly linked to the offence on account of the doctrine of recent possession, having been found in possession of PW's mobile phone. I find that the prosecution proved its case ibn respect of all the counts of robbery with violence. I accordingly dismiss his appeal on conviction. I also dismiss the appeal on conviction in respect of the 4th Appellant having found that circumstantial evidence against him linked him to the offence.

Sentence

100. It is now settled law following the Supreme Court decision in **Francis Karioki Muruwatetu vs Republic [2017] eKLR** that death sentence is no longer mandatory. That is not to say though that the court cannot impose the death sentence taking into account the holistic circumstances of the case. This includes not only the manner in which the offence was committed but also the impact of the offence to the victim(s) and the mitigation that an accused offers which may mitigate for a lesser sentence.

101**.** In the present case, as noted earlier in this judgment, one of the victims suffered a fatal shot gun wound. The robberies were occasioned in a horrific scenario, an ordeal that took approximately three hours. The victims were not threatened with death in some instances but three were raped. It is my view that the two Appellants do not deserve the mercy or leniency of the court. I also have regard to the fact that even if I pass the death sentence, I will not bring to life the deceased. However, justice must be seen to be done to those who survived the ordeal. And therefore, the penalty must be commensurate with the horror that they underwent.

102. I have taken into account that between the two only the 4th Appellant offered mitigation stating that he was the first born in the family and that he had never been involved in such an offence. The 1st Appellant did not also offer mitigation in this appeal. Having therefore considered the circumstances of this case, I set aside the death sentence and substitute it with life imprisonment, which they shall serve unless they are otherwise set free.

DATED and DELIVERED IN NAIROBI THIS 30TH DAY OF OCTOBER, 2018.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Appellant in person

2. Appellant in person

3. 3rd Appellant in person.

4. 4th Appellant in person.

5. Mr. Momanyi for the Respondent.