



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NANYUKI
CRIMINAL APPEAL NO. 77 OF 2016
PETER NGOTHO NDUATI APPELLANT
VERSUS
REPUBLIC RESPONDENT
CONSOLIDATED
CRIMINAL APPEAL NO. 78 OF 2016
MUCHOKI MURIUKI APPELLANT
VERSUS
REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Nanyuki Chief Magistrate's Court Criminal Case No. 224 of 2013 by Hon. E. NGIGI – Senior Resident Magistrate on 7th October 2016)

JUDGMENT

1. The 1st appellant **PETER NGOTHO NDUATI (Peter)** and 2nd appellant **MUCHOKI MURIUKI** alias **SHOTI (Muchoki)** are appealing against their conviction of the **offence of robbery with Violence, Contrary to Section 296(2) of the Penal Code**. They were convicted before Nanyuki Chief Magistrate's court. On being convicted they were sentenced to suffer death. The appeal is against both conviction and sentence. This court, as it is expected to, shall subject the trial court's evidence to fresh scrutiny, but shall bear in mind that it did not have the advantage of seeing or hearing the witnesses who testified at trial. See the case **OKENO –V- REPUBLIC [1972] EA 32**.
2. The prosecution's evidence was that Peter hired the lorry registration No. **KAS 956 Z** and its trailer No. **ZC2531** from its owner, **Andrew Nyaga (the owner)**, on **16th March 2013**. Peter informed the owner that he was going to use the lorry to carry wheat from Timau to Nairobi. Peter and the owner were well acquainted with each other before this hire. The owner stated that he had known Peter for 5 years. The owner also knew that Peter was running a chemist in Nairobi where the owner had occasion to purchase medicine. After Peter paid the owner Ksh. 40,000 as deposit of the agreed hire price of Ksh. 75,000, and after he had fuelled the vehicle Peter was allowed to proceed on his journey. The owner's driver Lukwa (the driver) was driving the lorry.
3. **Charles Wachira (Charles)** a nephew of the owner stated that he accompanied Peter and the driver on that journey. He stated that he was tasked by the owner to manage the vehicle on its journey. Charles

first met Peter when they embarked on their journey on 21st March, 2013. On that day Charles in the company of Peter and the driver took the lorry to Donholm to a mechanic for repair. After the lorry was repaired they fuelled the lorry with the fuel costing Ksh. 25,000. They then embarked on the journey. Charles stated that Peter informed him they were going to Timau to transport wheat. Before reaching their destination while at Narumoru the lorry was involved in a minor road accident, when another vehicle hit it from behind. That accident caused a delay in their journey because they had to wait for the lorry to be inspected. They were therefore detained at Narumoru police station until 25th March 2013, at 12p.m. when they were permitted to continue with their journey. While they were at Narumoru Peter telephoned Muchoki. Muchoki joined them.

4. Peter, Muchoki, the driver and Charles continued with their journey. They stopped at Nanyuki on 25th March 2013. It seems at that place they were joined by a person called Mungai, who did not testify at the trial. At Nanyuki, after they had parked the lorry Peter, Muchoki and Mungai left the lorry saying they were going to withdraw money. When the three returned to the lorry, Peter informed Charles that they were not going to get wheat but rather that they were going to get sheep for which Peter said he obtained a permit to transport. They left Nanyuki town and drove towards Timau at 10.00pm on 25th March 2013. Charles stated that as they went Peter directed the driver to drive into a farm where they found sheep.

5. **Elias Kimathi (Elias)** had been employed at Embori farm as a herder for two years. On the night of 25th March 2013 he was in the company of **Livingstone Kalulu, (Kalulu)** a fellow herder at Embori Farm. At 11 pm they were guarding the sheep in that farm. Elias was asleep as Kalulu kept vigil. Kalulu saw some people at the farm and woke up Elias. Elias shone his torch to the Boma where the sheep were and noticed that the sheep had been removed from the boma. Someone broke the windows of where Elias and Kalulu were sleeping, entered and then opened the door for others. Elias estimated the people were five but could not see them well. These people tied their hands and eyes using their aprons. Elias was hit with a panga on his head and hands. He did not see who hit him. Elias and Kalulu were taken out of the house by these strangers and they were able to hear the sheep being driven. They also were directed away from where they were together with sheep, but they could not tell where they were being taken.

6. Charles by his evidence stated that Peter directed the driver to where the sheep were in the farm. Charles noted that the sheep were about 100. Charles asked where the owner of the sheep was and Peter replied that the owner would be coming soon. Charles then noted a patrol car drive towards where they were, where upon all the occupants of the lorry ran out. Charles also ran and went towards Timau Police station.

7. **Maho Abdilu Maalim (security officer)** was at work, as a security officer, at Embori farm. On 26th March 2013 at 12am he was in a patrol car together with the driver they drove past one of the boma, where sheep are kept, and noted that its gate was opened. They went inside and noted the sheep were missing in that boma. The security officer said that the missing sheep were more than 90 in number. They also noted that the house of the herders, Elias and Kalulu, was broken into. The security officer called his boss, **Jackson Wachira Gutambo (the security boss)**. The security boss called the police at Timau Police Station to alert them of the theft of the sheep.

8. The security officer, together with other security personnel went to boma No. 34 where they found a lorry, which they noted did not belong to the farm. Its registration no was KAS 956 Z. They saw that the sheep had been loaded into that lorry. They did not see anybody with that lorry. Going around the lorry the security officer found Elias and Kalulu with their hands tied to the back. They untied them and took them to hospital. Elias was bleeding from injuries in his head.

9. Assistant Superintendent of police **Alexander Shikondi, (Shikondi)** was the officer in charge of police station (OCS) at Timau Police Station. He confirmed he received, on 26th March 2013, a phone call from the security boss who informed him that Embori farm had been invaded using the lorry registration No. KAS 956 Z trailer ZC2531. Shikondi rushed to that farm, and was later informed that Charles had reported at Timau Police Station where he stated that he was the manager of the lorry found at Embori farm. Whilst being cross examined, by Peter, Shikondi stated that the driver of the lorry was

later found hiding underneath the lorry.

10. Inspector of Police **Elijah Kamau (Elijah)**, the investigating officer of the case, stated that on 26th March 2013, he in the company of Shikondi, at 2.00 a.m., as they went to Embori farm, from where they had received report that there had been a theft. On arrival at the farm they found 27 sheep in the lorry whilst other sheep were scattered all over the place. They had to calm down people who had gathered round the lorry, wishing to set it on fire, stating that it had been brought on the farm to steal the sheep.

11. Charles stated that as he was at Timau Police Station Peter telephoned him and informed him that he was on his way to Nanyuki on a motor cycle. Charles informed the police about that telephone conversation whereupon the police mounted a road block and arrested Peter.

12. PW 4, a doctor by the name of Butt treated Elias for his injuries on 26th March 2013. He found he had deep laceration on the skull, on right finger and severe tenderness at the right middle finger. He was of the view the probable weapons were blunt and sharp.

13. Peter, on being found by the trial court to have a case to answer defended himself by pointing to the weakness and contradictions of the prosecution's evidence. He pointed out that some of the prosecution's witnesses confirmed that they had not seen him prior to attending court to testify. He also stated that the court should note when he was arrested he had no weapons. He faulted the evidence of the owner of the lorry and of Charles by stating that they failed to produce before the trial court any document which proved he hired the lorry. He said that the owner of the lorry should have produced the lease agreement and receipt of the deposit he paid for the hire. He faulted the "no objection certificate" the certificate which permitted transportation of sheep, because it reflected a date that was past to the date of the incident. Peter therefore stated that the said "no objection certificate" could not be relied upon by the trial court because it was invalid. Peter faulted the trial court's admission as exhibit the photograph's of the lorry because they were not produced by the person who took the photographs. Peter Produced in evidence as exhibits statements of Charles (PW 8) and the lorry driver. The latter did not testify at the trial. The purpose of producing those statement was to show the contradictions. Peter ended his defence by stating that there were sufficient doubts in the prosecution's evidence which should have led to his acquittal. On being cross examined Peter denied hiring the lorry from its owner (PW 5) and also denied obtaining "no objection certificate."

14. Muchoki in his defence sated that he was arrested at his home in Karatina two months after the incident. On being cross examined Muchoki stated that on 25th and 26th March 2013 he was at his house in the company of his wife. He denied involvement with Peter relating to sheep.

15. The Learned counsels, Mr. Onyango for the 1st appellant, and Mr. Kimani Njuguna for the 2nd appellant, submitted in support of their client's appeals both orally and in writing.

1ST APPELLANT'S SUBMISSIONS

16. On the first ground 1st appellant faulted his conviction by the trial court on what he stated was insufficient evidence which did not meet the criminal standard of proof. To support this ground learned counsel Mr. Onyango submitted that this court needed to confirm whether the ingredients of section 296(2) of the Penal Code Cap 63 were sufficiently proved. He submitted that from the prosecution's evidence there was doubt on the identity of the persons who injured Elias. There was doubt on the weapons used; there was no forensic connection of such weapons to the appellants; that there was no evidence the appellants injured Elias; and that the prosecution's evidence pointed to the injuries suffered by Elias to have occurred on a different date to the date of the incident.

17. Learned Counsel Mr. Onyango pointed out that none of the prosecution's witnesses saw the attackers of Elias. Further that there was no evidence on the number of people who invaded the farm.

18. Learned Principal Prosecution Counsel, Mr. Tanui, in response submitted that the prosecution had

adduced sufficient evidence at the trial which proved the guilt of the appellants.

19. Learned counsel Mr. Onyango cited the case of **SAMSON NYANDIKA V REPUBLIC [2014]eKLR** where the court referred to the case **OLUOCH V REPUBLIC [1985] KLR 549** as follows:-

“The ingredients of the offence of robbery under section 296(1) of the Penal Code are:-

a. Stealing anything and

b. At or immediately before immediately after the time of stealing,

c. Using or threatening to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained.”

This has been reaffirmed by this court on several occasions, such as in Daniel Muthomi M’arimi v Republic (2013) eKLR where the court stated that proof of any one of the three elements of the offence of robbery with violence would be enough to sustain a conviction under section 296(2) of the Penal Code.”

20. As it will be noted, from the above decision, the prosecution need only prove one of the above elements of the offence of robbery with violence. There was clear evidence that Elias was injured. Those injuries were confirmed by the doctor who treated him. That is one ingredient of robbery with violence; that is use of or threat of use of violence. Further Peter exhibited during his defence the statement made by the driver of the lorry called Boniface Lukwa. He submitted that statement even though that driver did not testify. In that statement Lukwa stated that when he was directed to drive to Embori farm, and the gate of that farm was opened, he saw about 20 people with pangas. He then stated that Peter and Muchoki began to load the sheep in the lorry. Twenty minutes later the patrol vehicle arrived and everyone began to run away. The driver in seeing 20 people all armed with pangas, shows that the prosecution also met another ingredient of robbery with violence.

21. The security officers who startled the robbers; and Elias and the police officers found sheep loaded into the lorry. The sheep had been stolen and accordingly the prosecution, yet again, proved another ingredient of robbery with violence.

22. The prosecution well met the criminal standard of proof, proving the offence of robbery with violence, and that proof was not affected by its failure to produce forensic evidence on the aprons used to tie the herders; it was not affected by the failure of Elias failing to give the registration number of the lorry since that registration number was given by the security boss, the police officer and Charles. That evidence is not either affected by Charles’ failure to specifically state that the sheep were loaded on to the lorry or that there were other persons who were accomplices of the robbers at the farm when they arrived.

23. Contrary to the submissions by Mr. Onyango the prosecution adduced evidence which directly connected the appellant to the act of stealing and injuring. It is clear from the evidence that Peter hired the lorry from its owner. The evidence of this hire by the owner was corroborated by Charles and by the ‘No Objection Certificate’. In this court’s view the fact that that certificate was valid from 6th February to 6th March 2013; and therefore invalid during the incident, did not affect the efficacy of that exhibit. On this I part ways with the finding of the trial magistrate who found that because of the certificate, as at the date of the robbery was not valid, it had no probative value. Whether or not it had expired mattered not but it is clear from the prosecution’s evidence that Peter intended to use it to transport the stolen sheep.

24. The 1st appellant, Peter, relied on the ground that his conviction was based on questionable circumstantial evidence.

25. In this court's view it is erroneous for the 1st appellant to submit that he was only convicted because he hired the lorry. That submission is contrary to the evidence on record. The prosecution adduced very cogent and credible evidence which showed that Peter was the master mind of the robbery. He hired the lorry, paid the owner a deposit and travelled in the company of Charles on the pretext that they were going to get wheat in Timau. On reaching Nanyuki and armed with the 'no objection certificate' to transport sheep, Peter informed Charles, and that is confirmed by the driver in his statement, that they were going to carry sheep and not wheat. Peter gave the directions, to the driver, of the place they were to get the sheep. On arrival they loaded sheep into the lorry and only ran away when the farm's patrol car was driven there. That evidence was not circumstantial, it was clear and direct evidence which placed Peter at the Center of the Crime of robbery with violence. It's clear that Peter's denial of hiring the lorry, at his defence, was obviously false denial. The trial court was persuaded by the prosecution's witnesses and dismissed Peter's defence as mere denial. This court supports that trial court's finding.

26. Although Mr. Onyango submitted that the manner of arrest of the 1st appellant was not corroborated, it is important to note that failure to so corroborate has no effect on the totality of the prosecution's evidence and Peter himself in his defence did not deny he was arrested at a road block.

27. Mr. Onyango has submitted that the prosecution failed to call Kalulu, the other herder, to corroborate the evidence of Elias.

28. It is correct to state that Kalulu and the lorry driver Lukwa did not testify but it is important to note that the prosecution has discretion on whether to call a witness. The courts will not interfere with that discretion unless it is shown the prosecution was influenced by some oblique motive. See the case **BENJAMIN MUGO MWANGI & ANOTHER V REPUBLIC**[1984]eKLR, a decision of the court of appeal. No evidence was shown that prosecution's failure to call those witnesses was in any way for oblique reasons.

29. It is important to note that the fact Kalulu and the driver were not called to testify did not in any way affect the strength of the prosecution's case.

2ND APPELLANT'S SUBMISSIONS

30. Learned counsel for the 2nd appellant Mr. Kimani Njuguna argued the appeal on five grounds which were:-

- (a) That the 2nd appellant was convicted of a defective charge;**
- (b) That the 2nd appellant was convicted on insufficient evidence;**
- (c) That vital witnesses were not called by the prosecution;**
- (d) That the trial court should not have relied on the evidence of Charles since he was an accomplice; and**
- (e) That the trial court failed to adequately consider alibi evidence.**

31. This court will begin by considering (b) and (c) above together.

32. Mr. Njuguna submitted that the owner of the lorry did not place the 2nd appellant in the hiring of the lorry. Further that Elias and the security officers did not place the 2nd appellant at the scene of crime. Further Mr. Njuguna argued that the prosecution failed to call evidence of Kalulu the doctor who treated Kalulu, Lukwa, the lorry driver, Mungai and the police photographer.

33. This court has already pronounced itself on the strength of the prosecution's case which in this court's view was not affected by failure of calling the witnesses set out in Mr. Njuguna's submissions.

That view holds true in the case of the 2nd appellant. The failure to call those witnesses was not, in this court's view because such evidence would have been adverse to the prosecution. See **BUKENYA V UGANDA [1972] EA 549**.

34. Was there sufficient evidence to convict 2nd appellant for the offence of robbery with violence? The evidence of the prosecution directly connected the 2nd appellant to that offence. The second appellant was nicknamed shoto. The 2nd appellant explained in his defence that he got that nickname because he was let handed. Charles in his evidence stated that 2nd appellant, Muchoki (shoto) joined them after he was telephoned by Peter, while they were at Narumoru. Muchoki joined them in the lorry in the journey to Timau. When Peter disembarked at Nanyuki, Muchoki went with him. On their return to the lorry Charles said Peter told him that they were going to get sheep and not wheat at Timau. It will be recalled that Peter on his return to the lorry had 'no objection certificate' in his name entitling him to transport sheep from Timau to Hurlingham in Nairobi. It is correct to state that the evidence connecting Muchoki to the offence is solely from Charles. Courts have often relied on the evidence of a single witness. In the case **Benjamin Mugo & Another V Republic (Supra)** the court stated:

“Subject to certain well known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness”.

Further in the case of **NDUNGU KIMANYI V REPUBLIC[1979] KLR 282**; the minimum standards of a single witness upon whose evidence the court can rely upon to enter a conviction was laid down as follows:-

“We lay down the minimum standards as follows;- The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not straightforward person or raise a suspicion about trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his evidence.”

‘Once the court is certain in its mind that the witness is honest, the court must proceed to consider whether the circumstances prevailing at the time and place of the incident favoured proper identification. The matter to be considered are matters such as the time when the offences took place, i.e whether it was at night or in broad daylight.’

35. Charles in this court's view was an honest witness. The trial court, which saw him testify, believed his testimony. He stated that his task in that journey was to report to his uncle as they progressed in the journey. His evidence was that Muchoki arrived in Narumoru, by taxi, and from then on joined them in the journey. Muchoki was with them as they drove into Embori farm, under the directions of Peter. Charles at one time stated in his re-examination that Muchoki also drove the lorry. Muchoki was part and parcel of the plan to steal sheep from Embori Farm. It follows that grounds (b) and (c) must simply fail. The prosecution proved that Muchoki was part of the gang that had gone to Embori farm to steal sheep. That evidence was consistent.

36. Muchoki submitted under ground (a) that the charge before the trial court was defective. The particulars of the charge were:-

“(1) PETER NGOTHO NDUATI (2) LAWRENCE KABERIA (3) MUCHOKI MURIUKI ALIAS SHOTO (4) NAHASHON KARIUKI RITHO: On the night of 25th – 26th day of March 2013 at Embori farm in Buuri district of Meru County within the Republic of Kenya jointly with others not before court being armed with offensive weapons namely metal bars and pangas robbed Livingstone Kalulu and Elias Kimathi of Embori farm of 27 sheep valued at Kshs.229,500 and at or immediately before or immediately after the time of such robbery used actual violence to Livingstone Kalulu and Elias Kimathi.”

37. Learned counsel Mr. Njuguna submitted that those particulars of the charge revealed two complainants. That, that being so both complainants had to testify, and in the absence of both of them testifying the charge become fatally defective.

38. At trial only one of the complainants testified, that is Elias Kalulu did not testify. That is the reason why the learned counsel argued that the failure of Kalulu to testify fatally affected the charge. Counsel relied on the Court of Appeal case **DAVID NGUGI MWANIKI V REPUBLIC Criminal Appeal No. 68 of 2001**. In that case the Court of Appeal was entertaining an appeal against a conviction of causing death by dangerous driving contrary to section 46 of the Traffic Act, Cap 403. In the charge the appellant faced before trial court the particulars of that charge stated that “*drove the said vehicle recklessly or at a speed or in a manner that was dangerous to the public.*”

The Court of Appeal proceeded to find that the duplicity in the charge was fatal and that **section 382** of the Criminal Procedure Code **Cap 75** could not cure such an irregularity. Before making that finding, the Court of Appeal engaged in the discussion of the use of conjunctive “**and**” and disjunctive “**or**”. In that discussion the Court of Appeal stated:-

“..... and the situation in which the conjunctive “and” is used so that though the charge is duplex, an accused person is not necessarily embarrassed or prejudiced.”

The Court of Appeal however found where in the charge the disjunctive word “or” is used the charge is fatal and is not curable under section 382 of Cap 75.

39. In the case before this court it will be noted from the reproduced particulars of the offence that the conjunctive word “and” is used between the two complainant’s names. Although that charge was duplex it did not make it fatal nor did it embarrass or prejudice the appellant. The prosecution was able to prove the robbery in respect to Elias who testified but did not prove it in respect to Kalulu who did not testify. Accordingly **ground (a) fails** because failure of Kalulu to testify did not render the charge defective.

40. On ground **(d)** above Muchoki faulted reliance on the evidence of Charles on the ground that Charles was an accomplice. Learned counsel Mr. Njuguna submitted that the conduct of Charles at the scene, when he ran away, and was later placed in the cell showed he was an accomplice.

41. The first thing to do is to determine who is an ‘**accomplice**’. This was discussed in the case **REPUBLIC v CHARLES MWAURA & ANOTHER (2016) eKLR** where court stated:-

“The Court of Appeal in the case of Anthony Kinyanjui Kimani –v- Republic (2011)KLR (Criminal Appeal 15/2007) grappled with this question, stated inter alia:-

“What legally constitutes an accomplice is not defined in our statutes but section 20 of the Penal Code makes every person who counsels or procures or aids or abets the commission of an offence, a principal offender. Section 396 of the Penal Code also define an accessory after the fact but it does not cover a person who merely fails to report a crime. In the case of Watete v Uganda [2000]2 EA 559, the supreme court held that “in a criminal trial a witness is said to be an accomplice if, inter alia, he participated as a principal or an accessory in the commission of the offence, the subject of the trial.” The same definition was restated by the same court in the case of Nasolo v Uganda [2003] 1 EA 181 where the court further stated:-

“On the authorities, there appears to be no one accepted formal definition of “accomplice”. Only examples of who may be an accomplice are given. Whether a witness is an accomplice is, therefore, to be deduced from the facts of each case. In Davies of Director of Public Prosecutions (supra), the House of Lords said at 513:

‘on the cases it would appear that the following persons, if called as witnesses for the prosecution have been treated as falling within the category (i) on any view, person who are particeps criminis in respect of the actual crime charged, whether as principals or accessories

before or after the fact (in felonies) or persons, committing, procuring or aiding and abetting (in case of misdemeanours).”

42. In the case **WARIGA –v-REPUBLIC [1984]KLR 617** the Court of Appeal set out how a court should receive evidence of an accomplice as follows:-

“1. When considering the evidence of an accomplice, the first duty of the court to decide whether the accomplice is a credible witness.

2. The corroboration which should be looked for when considering the evidence of an accomplice is some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it.

3. The corroboration must be independent evidence which affects the accused by connecting him or tending to connect him with the crime.”

43. Is there any evidence which shows Charles was either the principal offender; or aided or abetted the commission of the offence of robbery with violence; or was he an accessory after the fact; or was connected or tending to be connected to the crime? The answer is an emphatic no to all those questions. Charles was the nephew of the owner of the lorry. One gets the understanding that his role was simply to ensure that his uncle’s lorry was safe whilst on hire. He indeed did state in evidence that he was the manager of the lorry.

44. On the night of the incident he stated that when he noticed the people with him in the lorry were running away he too ran away. If indeed Charles was implicated in the robbery the last thing he would have done was to go to a police station. But that is exactly what he did. He ran to the Timau Police station to report the events that had occurred at Embori farm. The OCS of Timau Police Station Shikondi stated in this regard:-

“..... I got a call from our report officer and I was told that Charles Nyori had come to the police Station and he was claiming to be the manager of the lorry. I left and went back to the station and interrogated Charles Nyori and he told me he had come to report that he was with the driver and the lorry had been hired from Nairobi by Peter Nduati (1st appellant). He (1st Appellant) had hired it to come and carry wheat but then took them to this farm where they began to load sheep and then security officers came and Mr. Nduati began to run away and so he (Charles) also ran to the station (Timau Police Station).”

45. When one considers that evidence in totality and the actions that Charles took when everyone ran away from the lorry it becomes very clear that Charles cannot have been an accomplice. That ground **(d)** is therefore **rejected**.

46. On the last ground Muchoki faulted the trial court for having shifted the burden of proof, on him, in regard to the alibi evidence.

47. The trial court in considering the defence offered by Muchoki; that on the day of the incident he was at home with his wife; stated that Muchoki had failed to call his wife to confirm he was at home on the subject date. The burden of proving an alibi does not lie with the accused. See **SEKITOLEKO vs UGANDA (1967) EA 531**. Although the trial court may have seemed to have required Muchoki to prove his alibi defence this court as the first appellant court will reconsider that alibi defence in the light of the prosecution’s evidence.

48. As stated before Charles’ evidence placed Muchoki in the lorry that ended up at Embori farm. He went to the lorry after he was telephoned by Peter, Charles stated that even at one time he drove the lorry. He was in the company of Charles in the day of 25th March 2013 and continued to be with them in lorry up to the time they drove to Embori farm. That clear evidence displaces the alibi defence offered by Muchoki. Ground **(e)** therefore is **rejected**.

49. Before concluding this appeal it is necessary to consider the issue raised by both appellants that the trial court erred to have received in evidence photographs of the lorry with the sheep in it when those photographs were not produce by the one who gave the certificate as per the schedule in the evidence Act Cap 80. **Section 78(3) of Cap 80** gives the court discretion to summon the maker of the certificate. Before the trial court the photographs were referred to but not produced by the investigating officer Inspector of Police Elijah. The court could have exercised its discretion as per section 78(3) of Cap 80, in deciding not to summons the one who gave the certificate. However in my scrutiny of the lower court file I found those photographs were not produced in evidence. The appellant’s submission in that regard is rejected.

50. In the lower court’s proceedings there is what I would call harmless error which did not affect the prosecution. I have in mind the doctor’s evidence when, although he stated he treated Elias on the night he was attacked 26th March 2013, he later stated that the injuries were to months old. After stating so he repeated that he treated Elias on 26th March 2013. The statement that the injuries were two months old can perhaps be attributed to the trial court’s error in recording of the proceeding. It was an innocent error and of no consequence to the evidence.

51. In the end looking at the prosecution’s evidence in totality the prosecution proved the case of robbery with violence against both appellants, on the required criminal standard. It is because of that finding that the appellants’ appeals against conviction and sentence are dismissed. **The trial court’s conviction is hereby upheld and its sentence is hereby confirmed.**

DATED AND DELIVERED THIS 24TH DAY OF MAY 2017

MARY KASANGO

JUDGE

CORAM:

Before Justice Mary Kasango

Court Assistant – Njue/Mariastella

Appellant: Muchoki Muriuki

Appellant: Peter Ngotho Nduati

For 1st appellants

For 2nd appellants

For the State:

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE