



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
CRIMINAL APPEAL NO. 78 OF 2015

MICHAEL MUGO GICHONGE1ST
APPELLANT

-VERSUS-

REPUBLIC.....
PROSECUTOR

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 84 OF 2015

PAUL GICHUKI NJUGUNA2ND
APPELLANT

-VERSUS-

REPUBLIC.....
PROSECUTOR

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 83 OF 2015

OWUOR GEOFFREY OKOTH3RD
APPELLANT

-VERSUS-

REPUBLIC.....
PROSECUTOR

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 82 OF 2015

JOHN MUNJI NYOKABI.....4TH
APPELLANT

FRANCIS MWANGI NJOROGE5TH

APPELLANT

-VERSUS-

REPUBLIC.....
PROSECUTOR

(Being Appeals from Original Conviction and Sentence in Chief Magistrate's Court at Naivasha Criminal Case No 1814 of 2014 - P. N. Gesora, CM)

J U D G M E N T

1. The five Appellants herein, namely, **Michael Mugo Gichonge, Paul Gichuki Njuguna, Owuor Geoffrey Okoth, John Munji Nyokabi** and **Francis Mwangi Njoroge** were jointly charged alongside a sixth person in counts 3, 4, 5 and 6 with the offence of Robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code. The particulars are set out in the charge sheet.
2. In counts 1 and 2, the five Appellants herein were charged with Robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code. Particulars thereof are also stated in those counts. There were two alternative counts of Handling stolen goods contrary to Section 322 (1) and (2) of the Penal Code brought against the 1st and 2nd Appellants.
3. At the close of the trial, the Appellants herein were found guilty and convicted, while the 6th Accused person in the lower court trial was acquitted. The Appellants herein having been convicted on the 1st to 6th counts were sentenced to death on count 1, while sentencing in respect of the other counts was held in abeyance.
4. On this appeal the 1st, 4th and 5th Appellants were represented by Mr. Gichuki. Mr. King'ara represented the 2nd Appellant while Mr. Mburu represented the 3rd Appellant.
5. By the memorandum of appeal and the supplementary memorandum filed in respect of the 1st, 4th and 5th Appellants, Mr. Gichuki challenged (in the nine grounds of appeal), the identification evidence, the application of the doctrine of recent possession to the evidence presented against the Appellants in connection with the stolen mobile handsets and the admission of the Safaricom call data against the Appellants. The ground asserting failure by the court to ensure provision of witness statements to the Appellants was abandoned. However the Appellants contended that the court shifted the burden of proof to the Appellants, which in their view occasioned a miscarriage of justice.
6. Written submissions filed by the 1st, 4th and 5th Appellants' counsel in support of the grounds condensed the arguments around five key grounds. Regarding the circumstances of the robbery at **PW1's** house, Mr. Gichuki argued that in the absence of proper lighting, positive identification was not possible, a matter allegedly glossed over by the trial court. Besides, despite claiming that the same gang struck at his house on two occasions, **PW1** had not given a description of the assailants. The case of **Tekerali s/o Kirongozi and 4 others Others -Vs- Republic [1952] Vol 19 EACA 25** was relied on.
7. Thus Mr. Gichuki is of the view that **PW1's** evidence regarding the first robbery is unreliable, particularly in light of the uncertainty he expressed during cross-examination regarding identification of the 5th Appellant. On the second robbery incident, it was submitted that the presence of light from rechargeable torches and their location was not established. Further that the evidence concerning the lighting of the scene by witnesses present (**PW1, 2, 3 and 4**) and regarding the circumstances obtaining during the robbery was unsatisfactory and therefore the trial magistrate erred by finding otherwise.
8. Mr. Gichuki took issue with the trial magistrate's comment that the defence had not challenged the evidence that the robbers had lit torches while executing the robbery. Relying on the case of **Wamunga -**

Vs- Republic (1989) KLR 424 and **Julius Mutugi -Vs- Republic (2013) eKLR** Mr. Gichuki asserted that the police failure to conduct an identification parade in this case was a serious omission as neither **PW1** nor **PW2** had known the Appellants prior to the robbery. Thus their evidence was rendered mere dock identification and worthless.

9. Quoting a portion of lower court's judgment regarding the 1st, 4th and 5th Appellants' explanation concerning their use of the handset, stolen in the initial robbery, Mr. Gichuki argued on the second set of grounds that the court in rejecting the Appellants' explanation shifted to the Appellants the burden of proof. Besides, the Safaricom call data, produced by investigating officer **PW5** did not connect the 4th and 5th Appellants with the use of the stolen phone. In the same connection, he submitted that the owner of the recovered phone (**Eunice PW2**) did not identify it as hers, thus the doctrine of recent possession was inapplicable.

10. Ditto for the stolen woofer allegedly recovered by **PW5** from the house of the 1st Appellant. The position taken by the Appellant is that there was no evidence to connect the 1st Appellant sufficiently with the house from whence the said woofer was recovered.

11. Further submissions were made in the 3rd set of grounds in reinforcing earlier submissions that the doctrine of recent possession could not be properly applied in this case. The reasons given are as before; that the alleged stolen phone was not properly identified by its owner or connected through proven possession, with either the 4th or 5th Appellants - See **Isaac Ng'ang'a Kahiga & Another -Vs- Republic [2006] eKLR (Nyeri) Criminal Appeal 272 of 2005**.

12. It was argued that a phone is a fast moving item and the possession of the same by the 4th and 5th Appellants one month after the robbery cannot qualify as recent – See **Stephen Mwendu alias Godwin Omwanda -Vs- Republic Criminal Appeal No. 113 of 2014**.

13. The 1st, 4th and 5th Appellants took the position, regarding the Safaricom call data that it was produced irregularly, without compliance with Section 65 (6), 78 (1) and 106 B (4) of the Evidence Act as to certification and production by the maker. But that notwithstanding, the trial court placed reliance thereon without seeking the Appellants' position on the matter. For this submission the Appellants cite this court's decision in **Peter Mugo Mathu & 2 Others -Vs- Republic Criminal Appeal No. 27 of 2015 [2015] eKLR**. Finally the 1st, 4th and 5th Appellants attacked their conviction on counts 4 and 5 for the reason that there was no evidence whatsoever connecting them with the robbery against the complainants therein, namely **PW3** and **PW4**.

14. The 3rd Appellant through Mr. Mburu filed a Petition of Appeal containing seven grounds of appeal as follows:-

“1. THAT Trial Magistrate failed to appreciate the evidence of prosecution witness number 1 in relation to the charges before him facing the Appellant as the 3rd Accused. Prosecution witness number 1 related the 3rd Accused (Appellant) to the first attack in Count one (1).

2. The Trial Magistrate convicted the Appellant (3rd Accused) for a charge when there was no evidence against.

3. The identification and recognition of the Appellant (3rd Accused) as one of the attackers was not addressed by the court in its judgment to arrive at the conviction.

4. The Trial Magistrate failed to weigh the evidence of prosecution witnesses' number 1 and 2 and prosecution witness number 3 and 4 and note that in respected of the identification and recognition and all the victims of the attack faced the same circumstances. Prosecution witnesses number 3 and 4 did not identify or recognize the attackers.

5. The Trial Magistrate convicted the Appellant on the doctrine of recent possession. The Appellant's explanation as to the possession of the phone. The evidence of the Appellant in respect of the phone led to the arrest of Accused number 1 as the seller which explanation was reasonable. The Trial Magistrate in the Judgment fails to address the defence of the Appellant inclusive of the payment.

6. The Trial Magistrate failed to apply the Principle of beyond reasonable doubt in respect of the identification and recognition as no identification parade was conducted and the recognition was not captured in the first information report.

7. The evidence on record and explanation by the Appellant as to the recovery of the exhibit phone was ignored by the court.” (sic)

15. Despite the foregoing, the 3rd Appellant's submissions dwelt principally on the question of his alleged identification/recognition by the complainants in count 1. Challenging the complainants' evidence that the said Appellant had previously visited their home seeking employment, Mr. Mburu submitted that his description was not given to police in the first report, nor an identification parade conducted. He took issue with the evidence of identification at the scene of the offence as the source of light was not established. On testing of a witness's familiarity with an offender, Mr. Mburu cited **Norman Ambich Miero & -Vs- Republic [2005] eKLR**. Thus in his view the first and second counts against the 3rd Appellant were unproved.

16. Regarding other counts, he submitted that none of the complainants identified the Appellant. As regards possession of the recovered stolen phone, Mr. Mburu highlighted the chain of handling starting from the 1st, 3rd and 2nd Appellants in that order, and their explanations to the investigating officer beginning with the 2nd Appellant who was the first to be arrested.

17. In the petition of appeal filed on behalf of the 2nd Appellant by Mr. King'ara, 12 grounds of appeal are raised. Grounds 1, 2 and 3 challenge the prosecution identification evidence. Other key grounds which were argued at the hearing are as follows:

“4. The Prosecution's case was full of contradictions and inconsistencies and could not therefore sustain a conviction.

8. The learned Magistrate erred in law and in fact in putting more weight on the Prosecution's case than the Appellants to the detriment of the Appellants and which is clearly demonstrated in the lopsided Judgment.

9. The Prosecution failed to discharge the burden of proof placed on it i.e. beyond any reasonable doubt.

11. The learned magistrate erred in law and in fact when he misapplied the doctrine of recent possession to the facts and circumstances of the case.

12. The trial was unfair and conducted in breach of Article 50 (2) (c) and (h).”

18. Mr. King'ara's submissions regarding grounds 1, 2 and 3 reprise similar submissions by counsel for the other Appellants and it would be redundant to restate them here. Save that Mr. King'ara has quoted extensively from the English decision of **Republic -Vs- Turnbull & Others (1976) 3 ALLER 549** which has been adopted in many local cases regarding the proper treatment of identification evidence. He has also emphasised the fact that the complainants had been ordered during the second robbery to lie down which rendered it impossible for them to observe the robbers in the light described.

19. Also pointed out by Mr. King'ara were alleged contradictions in evidence by two of the victims (**PW1, PW2**) who by their first report did not confirm that they could identify suspects, but did so after

the second attack. That while the said duo who were also victims of the latter attack claimed they identified the robbers, the other two victims (**PW3, PW4**) did not. Other stated contradictions relate to the number of phones stolen.

20. On the issue of the application of the doctrine of recent possession, Mr. Kingara relied the principles in **Isaac Ng'ang'a Kahiga & Another -Vs- Republic (Nyeri) Criminal Appeal 272 of 2005; [2006] eKLR**. Emphasising that the handset recovered from the 2nd Appellant had been stolen a month earlier, Mr. King'ara said that the 2nd Appellant gave a reasonable explanation for the said possession. He relied on **Stephen Mwendu's** case for the proposition that the explanation was reasonable in light of the ease with which mobile phones can change hands.

21. Thus in his view, the doctrine of recent possession was misapplied in this case. And that the trial court out of bias dismissed the Appellant's explanations despite the admission made by the 3rd Appellant to have sold the phone in question to the 2nd Appellant. In Mr. King'ara's view this same alleged bias was also reflected in the trial court's handling of the evidence concerning the source of light during the robbery, thereby substituting the witnesses' evidence that light emanated from wall reflections, with a statement that light emitted from the robbers' torches. Overall, Mr. Kingara argued, the prosecution evidence amounted to suspicion and could not be the basis of a conviction. See **Sawe -Vs- Republic [2002] eKLR**.

22. Arguments were also made regarding the alleged infringement of the right to legal representation under Article 50 (2) (h) of the Constitution. Mr. King'ara submitted that the 2nd Appellant was aged 17 during the trial but was denied legal representation, and illegally sentenced to death.

23. In light of their submissions, counsels for all Appellants urged the court to quash the convictions and set aside the sentences meted out against all the Appellants.

24. The DPP through Mr. Mutinda reiterated the evidence adduced at the trial and opposed the appeal.

25. The duty of the first appellate court to the Appellant is as stated in **Pandya -Vs- Republic [1957] EA 336:-**

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

26. Briefly, the prosecution presented case in the lower court was as follows. **Jonathan Gichu Kanyango (PW1)** and his wife **Eunice Wambui Kanyango (PW2)** were a couple carrying on business and residing at Kayole Naivasha, during the material period. On the night of 31st August 2014 at 9.30pm while the couple was sleeping, a gang of about four men broke down the door and entered their house, and bedroom.

27. The gangsters were armed with a pistol, pangas and clubs. They stabbed **PW1** while demanding money. The couple gave them cash amounting to Shs 430,000/= and **PW2's Samsung Galaxy** phone. The robbers left the home after 20 minutes of ransacking and taking valuables and cash, but promised to return. **PW1** was treated as the matter was reported to police. No arrests had been made by time of the

second robbery on 28th September 2014.

28. On that date, the complainants were hosting **John Mbichu Njuguna**, a local pastor (**PW3**) and his wife **Lucy Mumbi Maingi** (**PW4**). **PW3** and **PW4** had visited to commiserate with **PW1** and **PW2** over the first robbery, and the four persons were in prayer, when a gang of seven men forced their way into the house. They were armed with pangas and knives. They ordered the occupants to lie down before hauling **PW1** and **PW2** to their bedroom in quick succession. They stabbed **PW1** and assaulted **PW2**, **PW3** and **PW4**. They took cash Shs 10,000/=, a DVD and sub-woofer, make Superstar from **PW1**.

29. From **PW3** they took two mobile phones (**Samsung duo sim** and **Techno**) and cash Shs 1,300/= while from **PW4** they took a **Nokia** mobile phone. **PW2** was robbed of a **Sony Erickson** phone. After the robbers had left the victims sought help from police and also attended hospital for treatment. It was the prosecution case through these victims that the five Appellants herein were the robbers who struck on both occasions.

30. Police, in the course of investigations traced **PW2's Samsung Galaxy** phone (**Exhibit 3**) to the 2nd Appellant at Kinamba area. He was arrested and led police to the 3rd Appellant whom he said had sold him the phone. The latter led police to the 1st Appellant.

31. The investigating officer **PC Samuel Kamau** (**PW5**) said that after arresting the 1st Appellant at Kabati, he refused to show them his house but that with the help of members of the public the police traced the 1st Appellant's house where they recovered the stolen **Superstar Sub-Woofer** (**Exhibit 4**). And that the 4th and 5th Appellants were also arrested in the same area after it was established that they had also used handset Exhibit 3. Some of the robbery weapons, namely daggers were recovered from a scene where they had apparently been abandoned.

32. When the Appellants were placed on their defence they all elected to make unsworn statements. The 1st Appellant narrated that while at Kabati on 30/9/2014 he was arrested. The 2nd Appellant said that he was arrested on 30/9/2014 and questioned about the source of his mobile handset. He led police to the person who had sold it to him. This person, is apparently the 3rd Appellant.

33. The latter testified that on the day of his arrest, he received a call to meet the 2nd Appellant. He was shown by police the phone recovered from the 2nd Appellant and confirmed he had purchased and used it. That on the next day police questioned him and he gave out the phone number of the man to whom he had sent money. That the said man was traced at a pool game venue and arrested. This man appears to be the 4th Appellant.

34. Similarly the 4th Appellant stated that on arrest, he admitted that he had used the Samsung phone shown him by police, a favour extended to him by the 3rd Appellant. For his part, the 5th Appellant stated that on the date of his arrest, police in the company of the 3rd Appellant accosted him, inquiring about the 4th Appellant.

35. Having considered the submissions made on this appeal and the entire record of the trial, it is my considered view that this appeal turns on two broad issues, namely the identification of the robbers involved in the two robberies and the application of the doctrine of recent possession. And further, that all other grounds challenging the prosecution evidence can adequately be dealt with under these two heads.

36. But first, it is necessary to dispose of the ground argued by Mr. King'ara in respect of the alleged breach of the 2nd Appellant's right to legal representation in light of his age, and secondly the illegality of his sentence. Reviewing the record of the lower court proceedings of 15/10/2014 when the consolidated charge sheet was presented in court, I note firstly, that though the 2nd Appellant had pleaded guilty to the alternative charge of Handling stolen goods contrary to Section 322 (1) and (2) of the Penal Code, the

court did not follow through with the plea after objections were raised by the prosecutor.

37. The prosecutor had also objected to the 2nd Appellant's release on bond and placed before the court an affidavit by the investigating officer. While addressing the court regarding the said affidavit he contested the fact, stated in the pre-bail report on the 2nd Appellant, that he was aged 17 years, asserting that he was 18 years. To which the 2nd Appellant responded as follows:

“I have applied for identity card and I have a waiting card. I am now 19 years old. I was sold stolen phone.”

38. These proceedings were conducted barely two months since the offence. Thus the submission by Mr. King'ara that the 2nd Appellant was a minor during the trial or at all and therefore entitled to legal representation at State cost is not sustainable. Ditto for the alleged illegality of the death sentence meted out against him.

39. Turning now to the remaining grounds of appeal, there was no dispute that the complainants herein were robbed, the first occasion involving only **PW1** and **PW2** and on the second occasion the latter couple as well as their guests **PW3** and **PW4**. Secondly, there was no dispute that in the course of the first robbery, the couple **PW1** and **PW2** lost money, a **Samsung Galaxy** phone and other valuables. And that in the course of the robberies, both **PW1** and **PW4** sustained injuries. In the case of **PW1** the injuries were fairly severe. In connection with the second robbery, phones, money and electronic goods, including a **DVD** and woofer were taken from **PW1**'s home and from their guests **PW3** and **PW4**. Further there is no dispute that the **Samsung Galaxy** phone **Exhibit 3** was recovered from the 2nd Appellant on the date of his arrest.

40. Regarding the **Samsung Galaxy** phone marked **Exhibit 3**, the record clearly shows how it was identified by **PW1** and **PW5** through visual identification and production of its case **Exhibit 9**. While it may have been ideal for **PW2** to also identify **Exhibit 3**, **PW1**'s evidence thereon cannot be discredited for that failure. He was after all **PW2**'s husband and he stated that he had bought the phone for her. The identification of the said phone by **PW1** was not challenged in cross-examination.

41. Indeed the Appellants all seemed keen to distance themselves from the original acquisition of the exhibit, asserting only to have been lent or sold the same by their respective co-accused. There is no merit therefore in Mr. Gichuki's submissions that the phone **Exhibit 3** was not properly identified by the owners. Equally, there was no dispute as to the recovery of the **Sub-woofer (Exhibit 4)** by police and its identification by **PW1** as part of goods stolen from his house on the second robbery incident.

42. It seems to me appropriate from this point to go directly into the second issue for determination on this appeal, namely whether the doctrine of recent possession was properly applied. In this connection I have been referred to the case of **Isaac Nganga Kahiga** where the Court of Appeal held that:

“It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.”

43. Recently, in the case of **Simon Kangethe -Vs- Republic [2014] eKLR** the Court of Appeal restated the applicable principles by stating:-

“Section 111 of the Evidence Act provides that: existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the

knowledge of such person is upon him...

In *Ogembo -Versus- Republic, [2003]1 EA*, it was held that:

“For the doctrine of possession of recently stolen property to apply, possession by the appellant of the stolen goods must be proved and that the appellant knew the property was stolen.”

Recently, this Court in *Moses Maiku Wepukhulu & PAUL NAMBUYE NABWERA -Versus- Republic CR.A NO. 278 OF 2005* (Koome, Mwera & Otieno-Odek, J.J.A.) quoted with the approval what constitutes the doctrine of recent possession in the case of *Malingi -Versus- Republic, [1989] KLR 225*:

“By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. That the item he has in his possession has been stolen; it has been stolen a short period prior to their possession; that the lapse of time from the time of its loss to the time the accused was found with it was (from the nature of the item and the circumstances of the case) recent; that there are no co-existing circumstances which point to any other person as having been in possession of the items.”
[Emphasis added]

The doctrine is a rebuttable presumption of fact. Accordingly, the accused is called upon to offer an explanation in rebuttal, which if he fails to do, an inference is drawn, that he either stole or was a guilty receiver.

As was aptly stated in the case of *Hassan -Versus- Republic, (2005) 2 KLR 151*:

“Where an accused person is found in possession of recently stolen property, in the absence of any reasonable explanation to account for this possession, a presumption of fact arises that he is either the thief or a receiver.”

44. In this case, it is indisputable that the **Samsung Galaxy** phone (**Exhibit 3**) had been stolen from **PW1** on 31/8/2014 during a robbery. It was admittedly recovered by **PW5** in the possession of the 2nd Appellant on 30th September 2014. Whether the possession in this case is recent enough to bring this matter within the doctrine depends, as stated in **Simon Kang’ethe**, on *“the nature of the item and the circumstances of the case.”* See also **Malingi -Vs- Republic (1989) KLR 225**.

45. Evidently, some items can change hands with more ease, and therefore faster, than others. The Appellant in the case of **Stephen Mwende** had in his possession a stolen mobile phone, some two months since it was stolen from the complainant. Although the period in the instant case – 1 month – is shorter I do subscribe to the general rule and exception in the reasoning of my learned brother and sister of the High Court in Mwende’s case.

46. The learned Judges observed that:

“This court takes judicial notice of the fact that a mobile phone is an item that changes hands within short period of time. In the course of two months, between the time of the robbery and the recovery of the mobile phone in the Appellant’s possession, it could have changed hands several times. A mobile phone is not an item which can irresistibly point to the guilt of the possessor if it is found in such possession two months after the incident. While it is true that the Appellant’s testimony in his defence was not helpful in regard to the circumstances that he was found in possession of the particular mobile phone, this court cannot, in the circumstances of this case, call upon the Appellant to give an explanation of how he came to be in possession of the particular mobile phone if the prosecution did not establish the person or persons who were using the particular mobile phone between the time it was robbed from Daniel to the time it was recovered in the Appellant’s possession. There being no other

evidence connecting the Appellant with the crime, this court is unable to find that the doctrine of recent possession was correctly applied by the trial court to secure the conviction of the Appellant.

The upshot of the above reasons is that the appeal lodged by the Appellant has merit. It is hereby allowed. His conviction is quashed. The death sentence imposed upon him is quashed. The Appellant is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.” (Emphasis added)

The court therefore proceeded to acquit the Appellant.

47. The logical exception intimated to, is that: the statement that possession of a mobile phone cannot raise a presumption of theft two months after offence, cannot be universally applicable to each and every case. In a case, where the prosecution is able to prove, as unsuccessfully attempted in this case, through telephone provider documents, that the stolen phone was always in the possession of the Accused, the length of period lapsed since theft may not matter.

48. In this case, the prosecution tendered through **PW5** the call Data Records (**MFI 11**) to demonstrate how the phone **Exhibit 3** had been used on different phones. Although no objection was made by the Appellants when the said record was tendered, the court agrees with Mr. Gichuki’s objection to the manner in which the evidence was handled. The record of the evidence of **PW5** regarding the said record was merely that:

“Accused 5 admitted having used the handset (Exhibit 3). I have the data from Safaricom (Service provider) before court. Safaricom data MFI 11.”

No attempt was made to connect the Appellants with the telephone numbers and calls made on the dates in the Safaricom Data records.

49. This document though marked for identification as **MFI 11** was never produced as an exhibit thus no reliance could be placed on it to verify the actual commencement of the phone possession by either the 1st, 2nd or 3rd Appellant prior to the date of recovery by **PW5** on 30/9/2014 from the 2nd Appellant.

50. The basis therefore of the learned trial magistrate’s following observation is not clear:

“I also note that the handset exchanged hands in terms of ownership in quick succession that it beats logic. It would appear that they were tossing the handset all over as if it was a hot potato burning their palms.”

It is for the above reasons *inter alia* that the trial court dismissed the explanation regarding purchase or use of the phone as given by the 2nd, 3rd and 4th Appellants. That notwithstanding, it is not unusual that persons jointly charged could be tempted lay blame on each other for self-preservation. That is why in addition to the period of time lapse in this case, proof of the call records was vital in establishing which person had the phone in which periods.

51. In absence of such evidence therefore, nothing turns on the evidence of the 1st, 2nd and 3rd Appellant’s alleged possession of the stolen phone in the circumstances of this case. With regard to the 2nd Appellant, there was no material presented in proof of guilty knowledge so as to bring the case within the alternative charge of Handling stolen goods. His explanation to have bought the mobile phone from his co-accused may well be true. The requirement under the doctrine is for an accused to give a reasonable explanation. (See **Hassan –Vs- Republic [2005] 2 KLR 151**).

52. Ultimately therefore, the prosecution failure to produce these call records through a proper witness as required under the evidence Act, opened a large fault in their case. Suffice to say that in my considered view, the possession of the stolen handset by the 2nd Appellant one month since theft did not qualify as

recent possession in the circumstances of this case.

53. Regarding the sub-woofer, **Exhibit 4**, there can be no dispute that it had been stolen from **PW1's** home a day prior to its recovery by **PW5**. **PW1** properly identified it and tendered its accessories including the remote control and 2 speakers (**Exhibit 5** and **6** respectively). The trial court properly found that the property belonged to **PW1** but proceeded to accept **PW5's** evidence that it was recovered from the house of the 1st Appellant. First of all it was a misdirection for the learned trial magistrate to state, before examining the weight of prosecution evidence on the question, that the “**Accused 1 does not deny that the sub-woofer was recovered from his house.**”

54. **PW5** clearly stated that the said Appellant refused to show his house to police and that members of public, who were not witnesses in the case, volunteered the information. No further attempt was made by the investigator to uncover the landlord or any material connecting the 1st Appellant to the recovery house. As observed by the Court of Appeal in **Isaac Ng'ang'a Kahiga**.

“In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice”

55. Indeed, according to the learned Judges of Appeal in **Simon Kang'ethe** an essential requirement before an Accused is asked to explain his possession is “*that there are no co-existing circumstances which point to any other person as having been in possession of the item.*” The obvious logic behind this statement lies in the fact that evidence of recent possession of stolen goods amounts to circumstantial evidence brought in proof of theft. The prosecution needed to establish the constructive and/or exclusive possession by the 1st Appellant of the stolen sub-woofer. Reviewing **PW5's** evidence, the court is not persuaded that it mustered the requisite threshold.

56. The recovery evidence does not sufficiently connect the 1st Appellant to the house where the sub-woofer was found. Thus he ought not to have been required to explain its possession. Ultimately it goes without saying therefore that the doctrine of recent possession could not have been properly applied in this case in connection with the two robberies at **PW1's** house. And it is clear that the prosecution was relying on the evidence of recent possession to prove the six counts of robbery in relation to the witnesses **PW1, PW2, PW3** and **PW4**.

57. The second strand of evidence upon which the prosecution placed reliance was the identification/recognition evidence of the various Appellants by the victims of the two robberies. Regarding the two incidents of robbery involving **PW1** and his wife, and the couple **PW3** and **PW4**, the Appellants have poked holes at the alleged identification/recognition of the Appellants by the witnesses, in the circumstances of this case, for several key reasons. Firstly, that the identification/recognition occurred at night with little or poor lighting, and secondly, that the witnesses were unable in their first reports to give police any descriptions of the robbers, and finally that no identification parades were conducted.

58. In their evidence, the prosecution witnesses **PW1** and **PW2** appeared to rely on their alleged recognition of all the Appellants in the second robbery, having allegedly seen them during the first robbery, and the alleged familiarly with the 3rd and 5th Appellants from respective interactions prior to each robbery. Undisputedly, the two offences occurred in night time in the house of **PW1** and **PW2**.

59. In the case of **Wamunga –Vs- Republic [1989] eKLR**, key witnesses claimed to have recognised the Appellant as among the robbers who had robbed them at night. After restating the evidence of the witnesses, the Court of Appeal for Eastern Africa had this to say about their evidence:

“Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness

of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach evidence of visual identification was succinctly stated by Lord Widgery C.J, in the well known case of *R v Turnbull* [1976] 3 All E.R. 549 at page 552 where he said:

“Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

This need for caution was also reiterated by the Court of Appeal for Eastern Africa in the case of *Abdallah Bin Wendo v R* 20 EACA 166 at page 168 thus:

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

60. In *Republic -Vs- Turnbull*(1976) J 3 ALL ER 549 cited above, the court after sounding caution in handling evidence of visual identification exhorted that a court in dealing with such evidence:

“Should.....examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? Was the identification impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the Accused before? How often? If only occasionally, had he any special reason for remembering the Accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the Accused given to the police by the witness when first seen by them and the actual appearance?”

(See also *Joseph Muchangi Nyaga & Another –Vs- Republic* [2013] eKLR.)

61. **PW1** stated, concerning the first attack by the four robbers that:

“Four of them entered our bedroom. One of them was carrying a pistol and he demanded for money. All the robbers had torches which they lit the room and the reflection of the wall paint made me identify the attackers as young men. The whole ordeal took about 20 minutes and I had all the time to see and identify them.....Accused 2 was present in both robberies and I saw him. He is the one who attacked and injured me..... dragged me into the bedroom on the second occasion.....Accused was in both robberies and in possession of the pistol and dagger which he used to stab me.

Accused 2 had previously come to my house to look for work. He was present during the first robbery frisking us. Accused 4 was present during the first robbery and the second time demanding money..... There was one attacker who had dreadlocks but I did not see his face.”

62. Clearly, **PW1** did not know any of the 1st, 2nd, 4th and 5th Appellants prior to the first attack. In cross-examination he admitted that he did not give a description of the attackers to police during the first report. With regard to the 3rd Appellant no specifics were stated as to the date when he allegedly visited the home of **PW1** and **PW2** seeking work prior to the first robbery. Concerning the circumstances obtaining in the bedroom where the actual first robbery took place, it is clear that the conditions did not

favour positive identification (See **Gikonyo Karume & Another -Vs- Republic [1980] KLR 23**).

63. **PW2** also stated that the robbers has torches and one was armed with a pistol, that **PW1** was stabbed and hit in the right eye as the robbers threatened to kill him if the couple did not give out money. Concerning lighting she stated:-

“There was sufficient reflection inside the room as we had just painted the house. I managed to identify one of them (3rd Appellant) as he had come to ask for work in our home.”

64. While relating the first attack **PW2** did not however identify to the court during her evidence-in-chief, the said person or other persons involved. She was however to insist later during cross-examination that the robbers had torches, that the 1st Appellant had a pistol, while the 2nd Appellant who was also present demanded valuables. As for the 3rd Appellant **PW2** identified him as the person who had visited the home earlier in search of work. Although she said that had happened at 8.00am and she saw the said man clearly, she gave no dates for that earlier encounter. Cross-examined by the 4th Appellant, she denied he was the robber who hit **PW1** on the eye and, stated that, the 5th Appellant was among the robbers.

65. Pausing there, here was a couple that was asleep in their bedroom, when armed robbers burst in demanding money. They attack **PW1** and threaten to kill him as they demand for valuables. They all have torches on, but it is not clear where the light thereof was directed. According to **PW1** and **PW2** the reflection of light on the wall and not the direct light from torches carried by the Appellants, enabled observation. One would expect such reflection to cause shadowy light that makes observation of facial features difficult. In my view it is quite difficult for the victims in those conditions to identify the robbers whether or not there were torches lit.

66. That is why it was necessary for the police, upon arresting the Appellants to test the identification of, at least the 1st, 2nd 4th and 5th Appellants through conducting identification parades to rule out the possibility of error. As to the alleged recognition of the 3rd Appellant by the two complainants in relation to the first robbery incident, the bare assertion that the said Appellant had visited their home previously in search of work cannot suffice. How long did the incident take and how long ago before the robbery? These questions cannot be answered on the basis of the witnesses' bare assertions.

67. Concerning the second robbery, only **PW1** and **PW2** claim to have identified the robbers, the visiting couple **PW3** and **PW4** stating that they were unable to. This second robbery, according to **PW1** and **PW2** also occurred at night and lasted close to 15 minutes. On this second occasion according to **PW1**, seven men burst into the living room and switched off electric lights before dragging **PW1**, and then **PW2** to the bedroom to hand out money.

68. **PW1** testified that on that occasion, he observed the robbers by light from rechargeable torches which were on, but he did not state the location of the said torches. More surprising is the indirect allegation that robbers who had switched off electric light in the house left rechargeable torches to continue shining during the robbery.

69. It would appear that the stabbing of **PW1** with the dagger, said to have been done by the 1st Appellant, occurred in the second robbery. While mentioning under cross-examination, the presence of the 1st to 4th Appellants in the second robbery, **PW1** admitted to the 5th Appellant's questioning that he resembled the robber who wore dreadlock hair style *“as he was slim as you are.”* However for her part, **PW2** stated that in the light of the re-chargeable torches, she saw the said 5th Appellant as he demanded money, while the 2nd Appellant ordered **PW1** to position his head ready for chopping off.

70. From the evidence of **PW4** the robbers ordered the two couples to lie down immediately, upon entering the living room before taking **PW1** and **PW2** away. Neither **PW3** nor **PW4** mentioned the presence of light from rechargeable torches or at all, during the said episode. Nor were these torches presented in court as evidence. If indeed such light was in the living room where the robbers first struck,

PW3 and **PW4** would have mentioned it and, or been able to identify the robbers.

71. As for the 5th Appellant, evidence by **PW2** that she had seen him in her compound earlier that day (28/9/2014) is not credible. If indeed she had recognized this person from the previous robbery, she would definitely have raised an alarm to get him apprehended or at least mentioned the incident to **PW1** before the attack. There is no evidence that **PW2** took any of these actions.

72. Reviewing the evidence on the second attack, the court is of the opinion that identification/recognition of the robbers was also fraught with difficulty given the conditions obtaining: the robbers on entering the living room switched off the lights, ordered the two couples to lie down and forced **PW1** and **PW2** into their bedroom to give up money and valuables. The alleged presence of the light from rechargeable torches, their intensity and location relative to the robbers cannot be ascertained from the victim's evidence. Moreover, like the first, the second robbery incident took a short period of time.

73. Identification/recognition evidence by **PW1** and **PW2** in the first robbery is to my mind evidence that is not free from the possibility of error. It cannot be relied on, as the prosecution seemingly attempted, to make the case that the robbers in the first robbery were also those in the second robbery. The reverse is also true: the evidence on the identity of robbers involved in the second robbery cannot be the basis of their identification during the first robbery.

74. In both instances, the evidence is weak and prone to error whether witnesses claim to have known or not known the Appellants prior to these incidents. And as indicated, the alleged familiarity in respect of the 3rd and 5th Appellants by **PW1** and **PW2** appears dubious as no proper factual basis was laid in this case – See **Norman Ambich Miero & Another -Vs- Republic Criminal Application No. 279 of 2005**.

75. Thus I have to agree with the Appellants' submissions that the identification/recognition evidence in this case is fraught with the danger of error and was, in the absence of an identification parade, mere dock identification, which is "generally worthless. "See **Ajode -Vs- Republic [2004]2 KLR 81** and **Gabriel Kamau Njoroge -Vs- Republic [1982 – 88] 1 KAR 1134**.

76. The trial court had in its judgment concluded that:-

"The identification made by the complainants (of the robbers) by PW1 and PW2 was watertight" [handwritten record]

This is consistent with an earlier finding in the judgment that seemed to accept the said evidence of identification. I note that the typed record of the judgment seemed to suggest that the trial court adopted contradictory findings on the identification evidence. The original record shows otherwise. In the last resort, the trial court based its conviction on the evidence of identification and recent possession of stolen goods, which as this court has shown is equally weak. Of the five Appellants, only the 1st and 2nd Appellants had been allegedly found in possession of the goods stolen during the 2nd and first robbery respectively. Had the court subjected the entire evidence to a thorough analysis, he would have reached a different conclusion.

77. In his explanation, the 2nd Appellant named the 3rd Appellant as the source of phone Exhibit 3. It would seem therefore that, the trial court having in its final finding accepted the identification evidence by **PW1** and **PW2** went ahead to convict the 3rd, 4th and 5th Appellants who had not been shown through credible evidence to have handled any of the stolen goods. As stated, their alleged possession of the stolen exhibit was not properly and precisely established.

78. Although on the face of it the Appellants' defences, save for the 2nd Appellant amounted to mere denials, the onus of proving their guilt lay with the prosecution. This court upon evaluating the trial evidence is not assured that the prosecution discharged its burden of proof beyond reasonable doubt in this case.

79. In the circumstances, the convictions against all the Appellants on the six counts of Robbery with violence contrary to Section 296(2) of the Penal Code cannot stand, and are hereby quashed. The death sentences imposed by the trial court are also set aside. All the Appellants are to be set at liberty unless otherwise lawfully held.

Delivered and signed at Naivasha, this **13th** day of **October, 2017**.

In the presence of:-

Miss Kavindu holding brief for Mr. Mutinda for the DPP

Mr. Gichuki for the 1st, 4th and 5th Appellants

Mr. Mburu for the 3rd Appellant

Mr. Mirie holding brief for Mr. King'ara for 2nd Appellant

Court Assistant - Barasa

Appellants - All present

C. MEOLI

JUDGE