REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEALS NUMBER 67 of 2015 and 35 of 2016.

JAMES IRUNGU KIIGE …………………………………..…1ST APPELLANT

JULIUS MUGWERU KAMAU…………………………..……..2ND APPELLANT

VERSUS

REPUBLIC ……………………….…………...…………….….RESPONDENT

(Being an appeal from the original conviction and sentence in the Kiambu Chief Magistrate's Cour at Kiambu Cr. Case No. 145 of 2013 delivered by Hon. S.K Arome on 29th April, 2015..)

JUDGMENT.

BACKGROUND.

The Appellants were charged jointly in the main count with the offence of stealing contrary to Section 268(2) as read with section 275 of the Penal Code. The particulars of the offence were that on the 5th day of December 2012 at Runda Estate in Nairobi county, jointly with others not before court, stole; three speakers, two amplifiers, one crossover, one equaliser, two microphones, three speaker stands, one bass speaker, two CD players, one rare mixer, one microphone mixer, assorted electric cables, one headphone and three bags of CD albums all valued at Kshs. 1,000,000/=(one million) the property of Samuel Mukiri Makumi.

In the alternative, the 2nd Appellant Julius Mugweru Kamau was charged with handling stolen goods contrary to Section 322(2) of the Penal Code. The particulars of this offence were that on the 14th day of January 2013 at Comrades Inn in Nairobi County, otherwise that in the course of stealing, dishonestly retained (1) Two mid-speakers make Mac Audio (2) One bass speaker make Mac Audio (3) One Mixer make Sound Craft (4) One flight case (5) One tool bag containing microphone batteries and chargers all valued at Kshs. 196,000/=, knowing them to be stolen goods.

After the trial the 2nd Appellant was convicted on the alternative charge while the 1st Appellant was convicted on the main charge. Being dissatisfied by the decision of the trial court the Appellants lodged an appeal to this court. The Appellant initially filed respective appeals which this court consolidated.

The 1st Appellant's advocate filed a Petition of Appeal in which he set out the following grounds of appeal:

1. ***That the learned magistrate erred in law and fact in finding that the Appellant had been positively identified as one of the thugs who committed the offence.***

2. ***That the learned magistrate erred in law in failing to draw a clear cut connection between the commission of the offence and the involvement of the Appellant.***

3. ***That the learned magistrate erred in failing to accord the Appellant the benefit of the doubt arising from inconsistent, not credited and insufficient evidence adduced by the prosecution.***

4. ***That the learned magistrate erred in finding that the Appellant had been contacted by the prosecution witness without success.***

5. ***That the learned magistrate erred in finding that the offence of stealing against the Appellant had been proved beyond reasonable doubt.***

6. ***That the learned magistrate erred in finding that the Appellant had ferried stolen goods aboard motor vehicle KBQ 474B***

7. ***The learned magistrate erred in failing to warn himself of the sufficiency of evidence on the possession and usage of motor vehicle KBQ 474B.***

8. ***The learned magistrate erred in finding that the prosecution proved the case beyond reasonable doubt.***

On behalf of the 2nd Appellant, a Petition of Appeal was filed by M/s Njugi B.G. & Company, his advocates on 12th May, 2015. It raised the following grounds of appeal;

1. ***The learned trial magistrate erred in law and fact in convicting the appellant relying on circumstantial and uncorroborated evidence.***

2. ***The learned trial magistrate erred in relying on hearsay evidence of prosecution witnesses.***

3. ***The learned trial magistrate erred in law and in fact in failing to consider the appellant's submissions before entering and delivering her judgment.***

4. ***The learned magistrate erred in law and in fact in not finding that the sentence meted out was grounded on an irregular conviction and hence lacked merit and/or legal foundation.***

5. ***The learned magistrate erred in law and in fact in failing to find that there had been gross inconsistency of witness testimonies and which inconsistency ought to have been exercised in favour of the accused.***

SUBMISSIONS.

The parties canvassed the Appeal by way of written submissions. They did not highlight the same.

In his written submissions the 1st Appellant argued that he was not adequately identified which was critical and further that the court relied on dock identification to link him to the crime in question. He further argued that the court had failed to show that the complaint and his friends had tried to contact the 1st Appellant without success. Evidence was never adduced as to the number that was called so as to establish that it was linked to him. He submitted that there was no evidence tendered that tended to link him to the ferrying or possession of the stolen goods. He also was never found in the possession of the vehicle that ferried the goods. He urged that the appeal be allowed.

The 2nd Appellant submitted that the case was never proved beyond a reasonable doubt, more so because

the learned trial magistrate relied on circumstantial and uncorroborated evidence. He took issue with the fact that the evidence of the 1st Appellant was used conviction against him. He submitted that the court relied on hearsay evidence which is not admissible in law. The Appellant concluded by submitting the trial court totally ignored his defence in which he explained how he had come into possession of the stolen property. That, had the court properly evaluated his defence, it would have acquitted him.

In opposing the appeal, leaned State Counsel, Ms. Atina, submitted that the 1st Appellant was properly identified. PW1,2 and 3 adduced evidence in that regard. In the respect of the 2nd Appellant, she conceded to the appeal submitting that the trial court shifted the burden of proof upon him in holding that he did not give a good explanation of how he came by the stolen goods. She therefore prayed that the 1st Appellant's appeal be dismissed but that of the 2nd Appellant be allowed.

EVIDENCE

The prosecution's case is well summarized in the evidence of PW1. It was that the Appellants were part of a cartel that was robbing businessmen particularly those in the events industry. On the date of the offence, the complainant had been contacted to provide his public address system to an event in Runda. The man seeking the services stated he would send his driver to pick the system and the relevant staff. The driver was directed to their location and he, the complainant, the disc jockey (DJ) and another were to all go in each other’s company to the event location. They loaded the system into the vehicle and embarked on their journey. On their way, the car suddenly developed some engine trouble. Since the car was still on the road and as such causing an obstruction, the driver asked them to get out and push the vehicle so they could park it on the curb. They then disembarked from the vehicle to try and get the vehicle off the road. They pushed the car away from the road but they were now obstructing a gate. They pushed further down the road and all over sudden the vehicle drove off, the driver leaving behind those who were pushing it. They tried to call the driver, at first he was not picking up and later on the phone went dead. The driver who drove away was the 1st Appellant. They reported the matter to the police and investigations were carried out.

The complainant was thereafter informed that a man had been arrested in Eldoret with a public address system. He therefore checked the social media pages and noted that the suspect was the man who drove off with his devices. He then reported the same at Runda Police Station and in the company of an officer from that station they went to the Eldoret Law courts where the man was going to be arraigned before court. The complainant recognized him and they asked the court's indulgence in bringing him back to Nairobi where he was wanted in connection with committing the offence of stealing. The court acquiesced and the 1st Appellant was charged.

One day as the complainant and the DJ were on their way back to Nairobi from a gig in Thika they stopped for a meal at the Comrades Inn at Kahawa Sukari. There, they noticed that the speakers appeared eerily familiar and a close scrutiny of the same proved that these were part of the goods stolen on the fateful day by the 2nd Appellant. They reported the same to Runda Police Station. Accompanied by officers they went back to the Inn where they confiscated the devices. The owner of the Inn who is the 2nd Appellant was also arrested. He could not adequately explain his possession of the goods or where he had gotten the same.

In emphasizing his evidence, **PW1, SAMUEL MUKIRI MUKAMI** testified that he had a company incorporated as Pure Oxygen Sounds which he owned with his brother. He recalled that on 5th December, 2012 he received a call from his colleague John who informed him that his friend was hosting a party in Runda at the German Embassy and his friend needed someone to provide a public address system and play music. He agreed to meet John at 2.00 pm and then proceeded to call his Disc jockey (DJ) called Daniel(PW3) who lived in Ngong. The client came at around 3:00 pm in a silver colored Toyota Wish car, registration number KBQ 474B. They loaded three mid range speakers, one bass speaker, two CD players, one rane mixer, two microphones, two speaker stands, two amplifiers, an equalizer, one cross-over make sound craft, one mixer, three bags of CDs and assorted wires. They then left for Runda in the vehicle. They passed through Uhuru highway then Muthaiga. It was while in Runda that the vehicle

stalled and the driver drove off and was never to be seen again. In court, he identified the driver as the 1st Appellant.

He testified that while at the Comrades Inn, Police Officers also asked the owner to show them the store and when it was opened they found a flight case, usually used to carry a mixer, that had his company name, Pure Oxygen printed on the side. He also found a tool kit that had his tools. The owner of the club opened the stores for them and was actually operating the machines when they arrived. He identified him on the dock as Mugweru, the 2nd Appellant. He confirmed that the suspect who was arrested in Eldoret was the 2nd Appellant. He was facing similar charges in Kisumu as well. He testified that the public address system was worth 1 million shillings. He gave various receipts evidencing the same.

PW2, JOHN KURIA KABURA, testified that he lived in Uthiru and was a dealer dealing with the promotion of goods and service. He recalled that on 5th December, 2012 he was called by one Thomas who informed him that his daughter at Runda had a function and she wanted a public address system and DJ services. He did not have the instruments personally but they agreed on a fee of Kshs. 35,000/-. The client was going to cater for his own transport and was to send his driver called David to collect the equipment

He called his friend Samuel, PW1, and briefed him on the arrangement with Thomas. He later received a call from David who introduced himself as the driver dispatched by Thomas. He gave him directions through a phone. He arrived in a motor vehicle registration number KBQ 474B make, Toyota Wish. He was surprised since they had agreed that Thomas would send a van. He then identified the 1st Appellant in the dock as the man who introduced himself as David. At the time the equipment was loaded in the car, he was in the company of PW1 and Daniel Ngunyi (DJ). He also accompanied them in the car before it stalled.

PW3, DANIEL NGUNYI NGURU was a Disc Jockey(DJ) by profession. He entirely corroborated the evidence of PW1 and 2. Suffice it to note is that he was in the company of PW1 and 2 when the 1st Appellant collected the equipment and they travelled in the same car into which the equipment was loaded before the car stalled.

PW4, CPL LINUS LOTULYA, then attached to Runda Police Station investigated the matter. He summed up the evidence of the prosecution witnesses. In addition, he testified that he made an inventory of all the items which were recovered at the Comrades Inn, which inventory was signed by both PW1 and the 2nd Appellant.

With regard to the arrest of the 1st Appellant, PW4 testified that he later got information that the person who had personally carried away the items was facing cases of theft in Eldoret and they were informed he would be in court on 26th February 2013. They went to Eldoret and on the specified date they were in the court gallery waiting to identify the suspect. He accompanied other prisoners and the complainant identified him (1st Appellant) as the one who carried away the goods. They then sought leave of court to bring him to Runda Police Station so they could prefer charges against him. The court granted the leave. The 1st Appellant was using the name James Irungu Kiinge but PW4 did a search with the Registrar of Persons and found out his real name was Irungu Mbuthia Kiinge. He also searched with the Registrar of Motor Vehicles for the car registration number KBQ 474B which had been used to perpetrate the crime and found it was registered under Leonard Mukuria Njunge. They made no more recoveries of the stolen items.

After the close of the Prosecution's case, the court made a ruling that the prosecution had made out a prima facie case and put both Appellants on their defence. They gave sworn evidence and called four other witnesses in support of their defence.

DW1, JAMES IRUNGU KIIGE the 1st Appellant testified that he was a student at Multimedia University. He recalled that on 17th February, 2013 at about 2:00pm he received a call on his phone from

his mother and she informed him he had been admitted to Moi University, Eldoret to pursue a degree in mass communication and journalism. On 19th February, 2013 at about 6:30 am he embarked on his journey to Eldoret. He was eating a snack outside Nakumatt Supermarket in Eldoret whilst leaning on motor vehicle registration No. KBN 599 S, a white RAV 4. CID officers from Eldoret approached him and arrested him. They interrogated him about the car which was later towed to the police Station but he had no clue of what they were asking him about. He was told he was in a syndicate that conned people which he denied. He was charged accordingly.

On 20th February, 2013, he was arraigned before the Eldoret Law Courts and charged with stealing contrary to Section 268(2) as read with Section 275 of the Penal Code. He was therefore facing charges over crimes he did not know. While still in Eldoret, some people from Kisumu came and asked to take him to Kisumu to face other charges. He was escorted to Kisumu and charged. Thereafter he was brought back to Eldoret where he was presented in court on 26th February, 2013. An application was made for him to be escorted to Runda Police Station. Thereafter, the present charges were preferred against him.

DW2, JULIUS MUGWERU KAMAU is the 2nd Appellant. He testified that on 22nd December, 2012 he made an agreement with Joskim Sound System Ltd where he was to pay Kshs. 7,500/= per week. He made a down payment of Kshs. 4,500/-. He also gave an order to his manager to pay them every Monday. He gave the agreement in question to the police. He paid Joskim Kshs.11,000/- on 28th December 2012, Kshs. 5,000/- on 5th January 2013 and Kshs. 7,000/- on 11th January 2013. He produced the petty cash vouchers he used to pay the same.

On 14th January, 2013 he was at his pub when he saw a vehicle with four occupants arrive. The passengers alighted and two of them came through the front door while two more came through the back door which aroused his suspicion. He approached the two who came through the front door and asked them what was wrong. They informed him that the music system in his pub was stolen property. He gave them access to the pub and they searched and recovered the music system. He did not deny that the items were in his possession but he informed them he had hired the items but that he did not know they were stolen.

DW3, GEORGE WAWERU KAMA testified that he was a disc jockey and he knew DW2 who was his older brother. He recalled that on 19th December, 2012, he was at Comrades Inn at Zimmerman, a branch of Comrades Inn, Kahawa, when he received a call from DW2 who asked him to go to Comrades Inn Kahawa Sukari and confirm if the music system he was hiring was good. He went and confirmed that the system was good and he advised him to proceed and hire it.

DW4, MARK RICHARD OKIDE worked at Kiambu Prison**.** He testified that on 25th February, 2013 while in the course of his duties as an employee of a car hire company was on his way to Maseno to locate one of their cars that had disappeared when he ran over a child at Namasaria area. He was arrested and taken to Kisumu Central Police Division where he met DW1. The latter explained to him why he had been arrested. He then told him he had read the story about the case in the newspapers and that the vehicles featured in the story, namely, KBQ 474B Toyota Wish and KBS 108N Toyota Fielder belonged to his former employer. DW4 told DW1 that car number KBQ 474B had been hired to James Irungu Kibe. DW1 told him that although people knew him as James Irungu Kiige, his real name was Jospeh Irungu Kiige.

DW 5, STEPHEN WAMAE NYAGA then a student at Kenyatta University testified that on 5th December, 2012 he was with DW1 who was a fellow student and colleague. He visited DW1 at Multimedia University at around 2:00 pm. The 1st Appellant asked him to install for him some software in his computer which he did.

DW 6, SILAS KINYUA KARURI testified that he lived in Githurai 44 and worked as a hotel manager. He recalled that on 20th December, 2012 he was at work at Comrades Inn Kahawa Sukari when people he had paid to install music came to install the same. They had hired the system from Joskim sounds for

Kshs. 8,000/- and they would come for their money every Monday of the week. On 5th December 2012 some people visited the pub and said that the system belonged to them and that was how the 2nd Appellant was arrested.

DETERMINATION.

Upon considering the evidence on record and the respective submissions, I find the critical issue for determination to be whether the prosecution proved its case beyond a reasonable doubt. I will first evaluate the evidence in respect of the 2nd Appellant. His case is that he was convicted on the basis of circumstantial evidence, after his arrest with stolen goods and allegedly giving a plausible account of how he came by them. He relied on the case of **Bernard Mwangi Njeri[2016] eKLR** where the court observed thus;

> ***"The law is now settled in respect of reliance on circumstantial evidence as the basis of a conviction.*** **See the case of Republic v Kipkering Arap Koskei & Kimure Arap Matatu[1949] 16 E.A., 135. The then East African Court of Appeal said;**
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> ***"In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt, and the burden of proving facts which justify the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused."***

An avalanche of case law exists that guide the court if it must convict based on circumstantial evidence. In **Mohammed & 3 others vs Republic[2005] 1KLR722** the court delivered itself thus:

> ***"Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency & they should be such as to exclude every hypothesis but the one proposed to be proved. In other words there should be a chain of evidence so far complete as to any reasonable ground for the conclusion consistent with the innocence of the accused and it must be such as to show that within human probability the act must have been done by the accused."***

Again, in **Republic vs Taylor Weaver & Donovan[1928] 21 Criminal Appeal CA 20** where the court stated:

> ***"Circumstantial evidence is very often the best evidence of surrounding circumstances which by intensified exam is capable of proving proposition with the accuracy of mathematics. It is no derogation of evidence to say it is circumstantial.''***

The above holding is buttressed in **Wills' on Circumstantial Evidence 6th Edition at page 311** in the words that:

> ***"...in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt."***

The investigating officer was among the people who raided the 2nd Appellant's premises, confiscated the stolen items and arrested him. He stated that the 2nd Appellant only brought the evidence that he had hired the devices to him after he was released on cash bail at the Police Station. There was also the testimony of DW6 who said that he was charged with the responsibility of paying the person from whom the equipment was hired. But on cross examination, DW6 said that he did not know the person he used to pay. Moreover, nothing was easier than the 1st Appellant calling the lessee as his witness. His failure to do so meant that there existed a doubt on whether the goods were hired at all. The only evidence as to the

payments were petty cash vouchers and none of them was from Joskim Sounds. Further, PW4, the investigating officer upon conducting a search of business names and with the Registrar of Companies found out that Joskin was neither a registered company nor a business name. It is then safe to conclude that the name may have been concocted for purposes of the case. In the circumstances, I hold that the circumstantial evidence was so strong and incompatible with any other inference than the 1st Appellant knew that the goods were stolen. He could not thus claim innocence.

The 2nd Appellant also alluded that the burden of proof was shifted upon him as he was required to explain how he was in possession of the goods in question which was the prosecution's duty. It is well settled law that where an accused is found in allegedly stolen property, he must be called upon to explain how he came by the property in rebuttal. That is to say that the presumption of guilt where an accused is found with suspected stolen property is rebuttable. See ***MALINGI VS REPUBLIC[1989] KLR 225*** *where Bosire J stated:*

> ***"By application of the doctrine [****of recent possession]* ***the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution have proved certain basic facts. Firstly that the item he had in his possession had been stolen; it had been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with was, from the nature of the item and circumstances of the case, recent; that there are no co-existing circumstances which point to any other person having been in possession of the item. The doctrine being a presumption of fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver."***

The same is buttressed by **ANDREA OBONYO VS R[1962] EA 542** where Sir Ronald Sinclair, P observed that evidence of being found with stolen goods is circumstantial and the inculpatory facts must be incompatible with the innocence of the accused.

> ***"...the presumption that arises from possession of property recently stolen is merely an application of the ordinary rule relating to circumstantial evidence. Where the evidence is circumstantial, 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 other than of his guilt."***

The above cases demonstrate that a party who is in possession of stolen goods must show how and why they possess the same in a bid to dispel the suspicion aroused by their possession of the recently stolen items. In the present case, PW1 was able to properly identify all the items recovered from the 1st Appellant's bar as his. They were inscribed with the words 'Pure Oxygen Sounds' which was his business company. Although the name of the speakers appeared erased, there was no doubt PW1 positively identified them. Be that as it may, the explanation that the 1st Appellant had hired the items was dispelled by the fact that Joskim Sounds, the company from which he purportedly hired them from did not exist with the Registrar of Companies. The 2nd Appellant did not also call the proprietor of the company to prove the source. DW6 did not also know to whom the hire money was paid. Although the goods were not recovered immediately after the theft, their positive identification proved that they belonged to PW1. In those prevailing circumstances, I find that the facts of the case clearly pointed to the guilt of the 2nd Appellant.

The 1st Appellant submitted that he was not properly identified and that the evidence at hand did not prove the charge beyond a reasonable doubt. He was charged under Section 286(2) as read with Section 275 of the Penal Coded. Section 268(2) reads;

> ***''A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say -***

(a) an intent permanently to deprive the general or special owner of the thing of it;

(b) an intent to use the thing as a pledge or security;

(c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;

(d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;

(e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner;

and "special owner" includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.

Under the provision, the prosecution needed to prove that the 1st Appellant stole the public address system with the intention of any of the purposes enumerated in (a) to (e) above. The first question to settle is the issue of his identification as he insisted that he was not so identified as the person who stole the goods. PW1, the complainant stated that he and PW2 and 3 were in the vehicle with the 1st Appellant and this gave him ample time to familiarize himself with his physical features. This evidence was corroborated by PW2 and PW3. PW1 thereafter got a tip of from a DJ friend that someone had been arrested in Eldoret for stealing similar items. He saw the same on social media. He then went to Eldoret and he confirmed the same. He went back to Runda Police Station and reported what he had witnessed. Together with the investigating officer they went to Eldoret where he identified the 1st Appellant when he came off the prison lorry at Eldoret Law Courts. They then brought him back to Nairobi and he was charged and convicted.

It must be noted that PW1, PW2 and PW3 all identified him in the dock. The question then is, whether the dock identification was credible. The principles that guide courts in relying on dock identification were set out on the case of **Muiruri & Another v Republic[2008] 1 KLR 283** thus:

'It cannot be said that all dock identification is worthless. The court must base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identity."

Also in **R VS TURNBULL[1972] 3ALL ER549** the court stated:

"[The court should state] the reason for that warning and should make some reference to the possibility that a mistaken witness could be a convincing one and that a number of witnesses could all be mistaken provided that the warning is in clear terms, no particular words need be used."

However, the view of this court is that the identification of the 1st Appellant was not just in the dock. Other circumstances prevailing were conducive for positive identification. The evidence of PW1, PW2 and PW3 was consistent in that, prior to the goods being driven off they had had sufficient time of being with the person who went to collect them. The witnesses stayed with this person pushing the car on the road after it stalled at his request. They chatted with him before the goods were loaded as he explained that he had been sent by the hirer of the goods. He also sat with them in the car for a considerable time before the car stalled. It was during the day. In such circumstances, the dock identification was well backed by visual identification on the material day. The question of a mistaken identity could thus arise. The witnesses identified this person as the 1st Appellant after his arrest.

The 1st Appellant obviously knew that the goods did not belong to him. He was driving with PW1,2 and 3 so that they could provide the services of operating the equipment at the function. Instead, he drove off

leaving them behind. He thereafter switched off his mobile phone and never contacted them again, an indication that his mission was purely to steal the equipment. He cannot therefore claim innocence.

In the result, I find that both Appellants were properly convicted. The prosecution proved their case to the required standard; beyond a reasonable doubt.

With regard to sentence, sentencing is always in the discretion of the trial court. The discretion must be exercised judiciously. For instance, sentence must be commensurate with the offence. It must also not be too harsh as to negate the deterrence purpose. Giving the maximum sentence, in my view, negates the deterrence purpose and may, instead, harden the offender. The 1st Appellant was handed the maximum sentence under Section 275 of the Penal Code which was not prudent. Although the circumstances of the offence were grave, I shall reduce the sentence to 18 months imprisonment. I do this bearing in mind that most of the stolen items were recovered. The sentence runs from the date of sentencing. With regard to the 2nd appellant, the sentence imposed was reasonable and I have no reason to disturb it.

I have also not seen an order ordering the restitution of the recovered goods to the complainant. He was able to identify two speakers, one mixer, one flight case and one public address system as his. I therefore order that all those exhibits be released to PW1. In the result, I find that the appeal lacks merit and the same is dismissed save with the variation of sentence in respect of the 1st Appellant. It is so ordered.

DATED and **DELIVERED** in Nairobi this **28th day** of **JULY, 2016**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:*t*

1. Mr. Njugi holding brief for Mathenge for the 1st Appellant.

2. Njugi for the 2nd Appellant.

3. Miss Tum for the Respondent.