REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 82 OF 2014

NICKSON LIGAKHA..APPELLANT

VERSUS

REPUBLIC..RESPONDENT

-consolidated with-

CRIMINAL APPEAL NO. 83 OF 2014

ERICK NYABERA..APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(*Being appeals from the original conviction and sentence of S.M. Shitubi – CM.*

*in Criminal Case No. 2677 of 2013 delivered on 24th June, 2014 at Kakamega***.)**

JUDGMENT

INTRODUCTION:

1. This judgment relates to two Criminal Appeals which were consolidated. They are Criminal Appeal No. 82 of 2014 and Criminal Appeal No. 83 of 2014 with Criminal Appeal No. 82 of 2014 being the lead appeal. **NICKSON LIGAKHA** became the 1st Appellant and **ERICK NYABERA** the 2nd Appellant.

2. On 09/12/2013, the Appellants herein appeared before the Chief Magistrate at Kakamega in Criminal Case No. 2677 of 2013 facing the following charge:-

> ***"ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296 (2) OF THE PENAL CODE.***
>
> ***(1) NICKSON LIGAKHA (2) ERICK NYABERA:- on the 5th day of December, 2013 at Kaluni sub-location, Madivini location in Kakamega South distric within Kakamega while armed with offensive weapons namely metal rods, robbed IBRAHIM IMBALI one mobile phone make Nokia 1200 value at Ksh. 2,400/=, five hens valued at Ksh. 2,600 and at or immediately before the time of such robbery wounded IBRAHIM IMBALI."***

On denying the charge, they were tried, convicted and sentenced to suffer death.

THE TRIAL

3. The prosecution called 5 witnesses in support of the charge.

PW1 was the complainant by the name of **IBRAHIM IMBALI**. He testified that on 05/12/2013 at 9.00 p.m. while he was in his house and as he went out to answer a call of nature, he met two people at the door who flashed a torch at him as one of them sharply hit him. The one who hit him was wearing a red jumper and due to his proximity with him aided with the torch light, he recognised him as someone he knew before. To him this person was called **NYABERA**. This person, he alleged, was the one who further hit him twice on the head and on the ribs. As the assault went on the other assailant tied his hands on the back with a rope. PW1 also managed to recognise the other assailant as **LIGAKHA** through the light from the torch. To PW1, both **NYABERA** and **LIGAKHA** were people very well known to him as they are his neighbours.

PW1 was then pulled into his house and **LIGAKHA** made him lie facing down. As the two assailants demanded for money, PW1 told them that he had none. **LIGAKHA** then stood guard near PW1 while **NYABERA** conducted a search in the house and managed to take 5 chicken, a phone make Nokia 1200, a wallet among other items. They then left leaving PW1 on the floor. After about 10 minutes PW1 managed to find his way to his neighbour one **CALEB AURA** and on informing him what had happened, Caleb freed him from the rope by cutting it. By then PW1 was bleeding from the injuries sustained. He was advised by Caleb to await for the following morning and report to the Area Sub-Chief. He obliged and truly went to see the Chief the following morning. That Chief was known as one **KAMU.** PW1 was then referred to the police at Eregi who then reffered him to hospital where he received treament and later on issued with a P3 Form which was filled at Mbale-Vihiga District Hospital.

4. PW1 identified the shirt in Court which he wore on the day of the attack which had blood stains as well as his phone which was recovered by the Chief. PW1 informed the Court that the light was from a huge torch that enabled him to clearly see and identify the assailants. He confirmed that it was **NYABERA** who had the torch and further confirmed that when his phone was recovered he was not present. He identified the Appellants in the dock as the ones who attacked and assaulted him, stole his items and injured him.

5. **CALEB AURA AMBASHA** was the Area village elder and testified as **PW2**. He confirmed that he actually was visited by PW1 who was injured and his hands tied at the back. He untied him and advised him to report to the authorities in the morning.

6. **PW3** was the Area Assistant Chief one **CORNELIUS HARAKA IMBOSA** of Kanuni Sub-Location. He testified that in the morning of 06/12/2013 at around 7.00 a.m. PW1 visited his home and reported that he had been attacked by thugs at around 9.00 p.m. the night before. He noted that PW1 was still bleeding from the forehead on the left. He advised him to report to the police which PW1 did. According to PW3, PW1 told him that he knew the attackers as NYABERA and LIGAKHA who all came from the neighbourhood. As PW3 equally knew the alleged attackers, he thereafter decided and went to see LIGAKHA on the same day. He interrrogated the said Ligakha who informed the Chief that they had bought some chicken and eaten some. On further enquiry, Ligakha disclosed that it was NYABERA who had the PW1's phone. Ligakha then led PW3 to Nyabera's house where PW3 recovered the phone make Nokia 1200. PW3 identified the phone in Court which PW1 had earlier on identified as his. He arrested the two persons and took them to the police together with the phone. PW3 identified the Appellants in Court as the people he had so arrested and which he very well knew as residents in his area of work.

PW3 clarified that the phone was in Nyabera's house and Nyabera was alone in that house. It is on record that when PW3 interrogated Nyabera about the phone,Nyabera stated that it was PW1's and he believed him since he had been so told as such by Ligakha who infact led him to Nyabera's house.

7. **PC Mathew Mutinda (No. 71946)** was the Inveastigating Officer who testifgied as **PW4**. He

confirmed that on 06/12/2014 PW1 reported that he had been attacked, injured and his items stolen the previous night by people known to him. He issued him with a P3 Form which was later on filled and returned to the station. He further testified that on the same day, 06/12/2013 at around midnight, PW3 brought in the Appellants having arrested them and recovered one phone – Nokia 1200. He also recovered the shirt PW1 had put on during the robbery and which had blood stains. He produced all the items as exhibits.

8. **PW5** was **DR. OLIVER MITO** of Vihiga District Hospital. He confirmed having filled in the P3 Form for PW1 on 09/12/2013 after examining him and scrutinizing the treatment notes from the health facility he had at the first instance received treatment. He had severe chest pains and had lost alot of blood. PW1 appeared slightly confused and had reccurrent headaches. He also had cuts on the head and swelling behind the ears among other injuries. He ascertain the injuries to be 3 days' old and clasified the same as harm. He produced both the treament notes and the P3 Form as exhibits.

9. On 08/04/2014 the prosecution closed its case and the Court delivered a ruling and put the Appellants on their defences. On complying with Section 211 CPC, the 1st Appellant herein opted to give unsworn statement without calling any witnesses whereas the 2nd Appellant gave sworn statement without calling any witnesses.

10. The 1st Appellant herein explained how he was arrested by the Area Assistant Chief and taken to the police station. The 2nd Appellant also reiterated how he was arrested in the night of 06/12/2013 by the Area Assistant Chief. He stated that during the arrest, he only heard one of the people who was with the Chief talking about the phone. To him he saw the Assistant Chief remove the phone from his pocket and planted it on him and when he tried to deny he was beaten. Sensing danger, he asked to be taken to the police station.

Whereas the 2nd Appellant admitted that PW1 was his neighbour and know him so well, he disclosed the existence of a land dispute between PW1 and himself and that PW1 had declared he would do something to the detriment of the 2nd Appellant's family. He indeed confirmed that he was a step-father to PW1.

11. The Court then delivered its judgment on 06/06/2014 and found the Appellants guilty as charged, convicted and sentenced them accordingly. It is the conviction and sentence which prompted the appeals.

THE APPEALS:

12. Both Appellants filed separate appeals. **NICKSON LIGAKHA**, the first appellant, preferred 8 grounds of appeal which he fashioned as follows:-

> 1. ***THAT, I pleaded not guilty to above appended charge.***
>
> 2. ***THAT, the trial magistrate erred in law and facts by relying on the evidence of single witness.***
>
> 3. ***THAT, the trial magistrate erred in law and facts by relying on the evidence of recognition by identification.***
>
> 4. ***THAT, the appellant was not supplied wih the witness statement during the trial.***
>
> 5. ***THAT, trial magistrate erred in law by delivering a substantial judgment without regard to the requirements.***
>
> 6. ***THAT, the prosecution rejected my sworn alibi defence which was cogent and sufficient.***
>
> 7. ***THAT, the trial magistrate erred in law and facts by convicting and sentencing me against the weight of evidence on record as the prosecution failed to prove its case beyond reasonable doubt as required by law.***

*8. **More grounds will be adduced after receiving my proceeding and judgment.***

13. The 2nd Appellant, **ERIC NYABERA** preffered 9 grounds tailored as follows:-

*1. **THAT, I pleaded not guilty to above appended charge.***

*2. **THAT, the appellant was not supplied wih the witness statement during the trial.***

*3. **THAT, the trial magistrate did not consider the light use for destination.***

*4. **THAT, the trial magistrate erred in law and facts by relying on the evidence of single witness.***

*5. **THAT, the trial magistrate erred in law and facts by relying on the evidence of recognition by identification.***

*6. **THAT, the trial magistrate erred in law and facts by convicting me by relying on the recovered phone without considering its recovery.***

*7. **THAT, the prosecution rejected my sworn alibi defence which was cogent and sufficient.***

*8. **More grounds will be adduced after receiving my proceeding and judgment.***

*9. **THAT, the trial magistrate erred in law and facts by convicting and sentencing me against the weight of evidence on record as the prosecution failed to prove its case beyond reasonable doubt as required by law.***

14. As stated earlier on, the above two appeals were consolidated with Criminal Appeal No. 82 of 2014 being the lead appeal. Both Appellants filed their respective submissions which they relied upon at the hearing of the appeals. Learned State Counsel, Miss Omondi opposed the appeal and prayed for its dismissal on the grounds that the Appellants had been properly identified by recognition and the 2nd Appellant was found with the stolen phone. The hearing of the appeals is what culminated with this judgment.

ANALYSIS AND DETERMINATION:

15. This being a first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

16. Looking at the grounds of appeal and the parties submission, we will deal with this appeal under the following heads:-

a. **On identification of the assailants:**

17. It is only PW1 who tendered evidence on the identification of the Appellants herein. That evidence was by way of recognition. It is not in dispute that the attack was on 05/12/2013 at night. It was around 09.00 p.m. As PW1 came out of his house to answer a call of nature he suddenly met two people at the door. One had a torch and flashed it. He was then hit by the other one. He fell down and was again hit on the head and ribs. He stated that the one who hit him came so close to him and being aided by the touch-light he recognised him. He was in a red jumper. He recognised him as Nyabera, his neighbour. There was also the other person who was in the company of Nyabera. PW1 states that he also recognised him as his neighbour as he tied him using a rope. He was also aided by the light from the torch which Nyabera had. He so recognised him as Likakha. These two people pulled PW1 into his house and laid him facing

down. They demanded for money and PW1 told them that he did not have and they decided to search the house. It was Nyabera who had the torch and who searched the house and they took and left with several items belonging to PW1. Both the Appellants admit that they were known to the PW1 very well being neighbours and indeed the second Appeallant in his defence stated that he was PW1's step-father.

18. PW1 also clarified that the torch was huge and produced sufficient light which enabled him to recognise the two Appellants herein. After they left, PW1 managed to go to his neighbour PW2 who assisted him by the cutting the ropes and advised him to await the following day to report to the authorities. On 06/12/2013 at around 7.00 a.m. PW1 was at the Area Assistant Chief's home (PW3) and reported the matter. He disclosed to PW3 that he managed to recognise the robbers as Nyabera and Likakha both of whom came from the neighbourhood. He was then referred to Eregi Police Patrol Base and where he was reffered to hospital.

19. Courts have been called to exercise extreme caution when dealing with evidence on identification especially if the conditions may be difficult to favour positive identification. That is the case even in instances of identification by recognition as one can equally be mistaken. The court in the case of **R. VS. Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system clearly stated the parameters in respect to the issue of identification especially by a single witness. The court expressed itself as follows:-

> ***"... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? 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 his actual appearance?.... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

The foregone was buttressed by the Court of Appeal in the case of **Wamunga Vs Republic (1989) KLR 426** where it stated as under;-

> ***"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."***

It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.

20. From the foregone it does not mean that there cannot be safe recognition even at night. The Court of Appeal in **Douglas Muthanwa Ntoribi vs Republic (2014) eKLR** in upholding the evidence of recognition at night held as follows:-

> ***"On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified:-***
>
> > *"I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant."*
>
> ***The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the***

appellant based on recognition was free from error..."

Again the Court of Appeal in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs R (unreported)** had this to say on the evidence of recognition at night:-

> ***"We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as 'neighbours from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants."***

21. From the above analysis, this Court finds that the ordeal must have taken some considerable time. It span from the encounter at the door where PW1 was tied on the ground to being pulled into the house, the assailants demanding for money and eventually searching of the house and thereafter escaping. All these happened when the powerful torch was on and at any point in time at least one of the robbers was near PW1. As PW1 was a neighbour to the robbers and so related to one of them, he knew them by appearances and names. He disclosed the names to PW3 when he made a report. He was equally familiar with their voices.

22. It has been restated in several judicial authorities that the naming of an alleged robber adds alot of credence to identification by recognition. PW1 did so to PW3 and so informed the Investigating Officer (PW4) that he had recognised the robbers. In the case of **Simiyu & Another vs. R. (2005) 1 KLR 192**, the Court of Appeal stated that there is no better mode of identification than by name and when a name is not given then there is a challenge on the quality of identification and a great danger on mistaken identity. The Court of Appeal restated the foregone in the case of **R. vs. Alexander Mutuiri Rutere alias Sanda & Others (2006) e KLR** by stating that if an accused as known to the witness but no name is given to the police, then giving the name subsequently is either an afterthought or the evidence given is not reliable. In **Lesarau vs. R. (1988) KLR 783**, the Court of Appeal emphasized that where identification is based on recognition by reason of long acquitance, there is no better mode of identification on them by name. (See also **Morris Gikundi Kamunde Vs. Republic (2015) eKLR.)**

23. It is therefore our finding that the giving of the Appellants' names to PW3 when he made the first report, PW1 strengthened his testimony on identification by way of recognition.

24. **But was there any form of corroboration in this case?** Let us look at the alleged issue of the recovery of the phone! After PW1 had disclosed the robbers' names to the Assistant Chief (PW3) he was advised and went to report to the police. It appears that PW3 took it upon himself to trace the alleged attackers since they were people from his area of work. He began with the one known as Likakha. When PW3 went and met Ligakha in his house he interrogated him on the robbery. Ligakha stated that 'they' had bought some chicken and eaten some. He also revealed that it was Nyabera who had the phone. He even offered to and led PW3 to Nyabera's house. On reaching there, they found Nyabera in his house and truly the phone was inside the house, on top of a table. Nyabera was all alone in the house. The phone was recovered and eventually taken to the police alongside the Appellants herein. PW1 identified the phone as his.

25. The 2nd Appellant herein however denied that he was in possession of the phone. He alleged that it was PW3 who came with the phone into his house and planted it upon him. He in particular stated as follows:-

> ***" .... the assistant chief was with others. I was told to sit. I sat. Among the people with the assistant chief two went to my sitting room .... the ones in sitting room kept murmurring. One said there is the phone. I could not tell the phone they were talking about ...... the Assistant***

Chief removed a phone from his pocket and said I had it when I tried to deny I was beaten ...."

During cross-examination by the 2nd Appeallnt herein, PW3 stated as under:-

> ***" .... I questioned you over the phone. I asked whose it was. You said it was Ibrahim's. It is lies to say we came with the phone. We came on 1st accused direction. I believed for I found the phone and chicken ...."***

26. Looking at the twin versions on the recovery of the phone, we are unable to agree with the 2nd Appellant's position. We are in agreement with the evidence of PW3 that he found and recovered the phone in the 2nd Appellant's house. This is because the phone was among the items stolen during the robbery. PW3 did not go to the 2nd Appellant on his own but "**was led to Nyabera's place by the 1st Appellant who told him that it was Nyabera who had the phone."** We are also suprised by the 2nd Appellant's inconsistency in respect to the recovery. At one point he states he heard the people who came with the PW3 saying that they had found the phone in his sitting room and then says that he saw PW3 remove a phone from his pocket and planted it on him. The 2nd Appellant does not say if the phone he heard the people at the sitting room talking about was the one which was brought to PW3, put in his pocket and then planted on him. We therefore find that the phone was rightfully found in the 2nd Appellant's house just like what the 1st Appellant had informed and directed PW3.

27. As the robbery was on 05/12/2013 and the recovery of the phone was on 06/12/2013, we shall now venture into the realm of the **doctrine of recent possession** in a bid to find out if the recovery can connect the Appellants or any of them to the robbery.

The Court of Appeal in this case of **<u>David Mugo Kimunge vs. Republic (2015)eKLR</u>** and in citing the case of **<u>Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a vs. R. Criminal Appeal No. 272 of 2005 (UR)</u>** with approval, expressed itself as follows:-

> **"16.** ***The doctrine of recent possession has been applied in numerous decisions of this court and the High court properly cited the Kahiga case (supra) as one for the elements necessary for proof. We may reproduce the elements from that case:***
>
> *"It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved.*
>
> *In other words, there must be positive proof:*
>
> *i). that the property was found with the suspect;*
>
> *ii). that the property is positively the property of the complainant;*
>
> *iii). that the property was stolen from the complainant;*
>
> *iv). 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."*

28. The Supeme Court of Canada in the case of **<u>Republic vs. Kowkyk (1988) 2 SCR 59</u>** accepted the following summary of the doctrine of recent possession:-

> ***"Upon proof of the unexplained possession of recently stolen property, the trier of fact may –but not must-- draw an inference of guilt of theft or of offences incidental thereto. Where the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be for the trier of fact upon a consideration of all the circumstances to decide which, if either, inference should be drawn.***

In all recent possession cases the inference of guilt is permissive, not mandatory, and when an explanation is offered which might reasonably be true, even though the trier of fact is not satisfied of its truth, the doctrine will not apply."

Whereas the Canadian case is only persuasive, it is worth noting that there is no significant disparity between the English/Canadian position and what has been accepted as the applicable doctrine in our Courts. The Court in **<u>David Mugo's case</u> (supra)** went further and stated as follows:-

" ....it is also clear from the decision that the truth of the explanation alluded to in the doctrine is not the standard applicable. Nor is it acceptable that a fanciful or concocted explanation will suffice. The explanation must pass the muster of reasonableness and plausity........."

29. The fogone clearly reveals that the doctrine of recent possession mainly relies on the facts of a particular case and that is why the Supreme Court of Canada in the **<u>Kowlyk case (supra)</u>** stated that the **'tier of fact'** may draw an inference of guilt of theft or of offences thereto on proof of unexplained possession of recently stolen property. The tier of fact in the case was the Chief Magistrate's Court which had the advantage of seeing and hearing the witness testify before it. We are reminded that the first Appellate Court must of necessity always give allowance for this advantage and be slow to interfere unless where there was no evidence to support the findings or the findings were perverse.

30. On the facts recorded before "**the tier of fact**", the phone was recovered on a table in the 2nd Appellant's house and not in the person of the 2nd Appellant. Could the 2nd Appellant therefore be construed to have been in possession thereof?

Section 4 of the Penal Code, Chapter 63 of the Laws of Kenya defines **possession** as follows:-

"Possession" –

(a)"be in possession" or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person:

(b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody ad possession of each and all of them;"

31. As the phone was found in the house belonging to the 2nd Appellant, the 2nd Appellant was therefore in possession of the phone in view of the above definition of 'possession'. However, since the 1st Appellant knew where the phone was and indeed led PW3 to its recovery, he is equally deemed to have been in possession of the very phone in law. Therefore both the Appellants herein were in possession of the phone and the tier of fact was correct in its finding on this aspect.

31. On the issue as to whether the phone belonged to PW1, the tier of fact found that PW1 had been robbed of his phone the previous night and the 1st Appellant led PW3 to the 2nd Appellant's house where the said phone was recovered. We do again agree with the trial court. PW1 had clearly indicated that he had lost several of his items during the robbery including a phone make Nokia 1200. What was recovered was a Nokia 1200. Whereas we do remain alive to the truism that there are many such phones in the public domain, the fact that it is the 1st Appellant who led PW3 to recover the very phone, Nokia 1200, from the 2nd Appellant corroborates the view that the phone which was so recovered was the one stolen during the robbery and belonged to PW1. Further PW1 in his evidence stated that:-

"...... it is Nyabera who took my phone (shows mfi 1b). It is this one (EMEI – 358317/03/905982/5). It is the sub-chief who recovered it .....It is Ligakha who tied me. Nyabera did the house search.

He took

- ***5 chicken –hens.***
- ***phone Nokia 1200.***
- **......................**
- **......................*”***

What PW1 therefore stated was aptly corroborated by the 1st Appellant’s disclosure that the phone which had been robbed from PW1 was with the 2nd Appellant. We do so find that the phone which was recovered and produced before the trial Court was the one which was stolen from PW1 on 05/12/2013. We hence reject the contention that PW1 failed to produce any documets as proof of ownership. We say that ownership can be proved in various ways depending on the circumstances of a case. In this case the chain of events from the theft upto the recovery remained unbroken and left no room for doubt on the ownership of the phone. Further PW1 even identified the phone by its serial number.

32. As to whether the phone was recently stolen from PW1, we equally agree with the tier of fact on its finding. PW1’s evidence remain so clear that the phone was among the items stolen from him on 05/12/2013. He made a report to the Assistant Chief and the police in the morning of 06/12/2013. Recovery of the phone was in the night of 06/12/2013 within a period of less than 24 hours. The time taken upto the recover of the phone therefore does not negate the doctrine of recent possession in this case.

33. Having considered the evidence on identification by recognition coupled with the applicability of the doctrine of recent possession in this case, we are clear in our minds that the prevailing circumstances provided an enabling positive environment for the safe recognition of the Appellants by PW1. This evidence is so adequately corroborated by the recovery of the phone which was one among the stolen items. Being guided by the holding in **Mailanyi vs. R. (1986) KLR 198** and upon warning ourselves of the danger of relying on the evidence of a single witness, we are satisified that the evidence adduced before the trial Court left no room for any such doubt as to a possibility of mistaken identity and that the Appellants were correctly identified and connected with the robbery. The Appellants’ defence as laid did not in any way weaken the prosecution’s case and the trial Court rightly rejected the same.

b. **On proof of the charge:-**

34. Was the charge of robbery with violence proved?

There is ample evidence that on 05/12/2013 PW1 was attacked by the Appellants herein. He was hit and fell down. He was further beaten on the head and the ribs and had his hands tied at the back. He had to be freed by PW2 who was his neighbour and who saw PW1 bleeding profusely. PW3 also confirmed that when PW1 went to his home to report in the morning of 06/12/2013 he was still bleeding from the forehead. PW1 also identified the shirt he was wearing when the robbery took place which was blood-stained. PW5 (Dr. Otieno Mito) who filled in the P3 Form for PW1 confirmed that PW1 had been severely wounded. He relied on the treatment notes from the Health Centre which PW1 visited as directed by the police. The injuries which PW5 confirmed on PW1 are consistent with the evidence of PW1 , PW2 and PW3 and there is also evidence to show that those injuries were sustained during or immediately before the robbery. It is therefore evident that the robbers used violence on PW1 as a result of which he was wounded. The charge was therefore prooved in law.

c. **On the defectivity of the charge:-**

35. The Appellants also raised an issue of the defectivity of the charge and argued that the charge was only based on Section 296(2) of the Penal Code which is the section of the law on the sentence. We have carefully considered this ground and noted that Section 296 (2) aforesaid provides two elements being the aspect of actual violence and the sentence. It is therefore not wholesome true to say that Section 296(2) of the Penal Code is on sentence alone. However, since Section 295 of the Penal Code is what lays the basis for Section 296, it is always a good practise to have the charge read as follows:-

> ***"Robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code."***

Be that as it may, the charge as drafted is not defective. That is on two reasons. First, the charge complies with Section 137 of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya and second, the charge complies with the format under the Second Schedule of the Criminal Procedure Code under Form 8 on robbery. We therefore find that there is no defectivity that occassioned any injustice at all to the Appellants moreso given that they participated in the full trial with knowledge of the charges they faced. We hasten to say that even if there was any such defectivity, the same would definitely be curable under Section 382 of the Criminal Procedure Code.

d. <u>On witness statements:-</u>

36. There is also the allegation that witness statements were not availed to the Appellants. We have perused the record and noted that the Appellants took plea on 09/12/2013. When the matter came up for a Mention on 23/12/2013, the first Appellant herein asked for the said statements. In response to the request the Prosecutor undertook to pass a word to the Investigating Officer so that the statements are availed to the Appellants during the next mention. The Court noted the response. The next mention was on 06/01/2014. When the matter was called out in the presence of the Appellants it was fixed for hearing on 17/02/2014 with a further mention on 20/01/2014. The Appellants did not raise the issue of statements. Come the 20/01/2014 again the Appellants did not raise that issue. The matter was further mentioned on 03/02/2014 and the Appellants again did not raise the issue of statements. The matter was hence confirmed for hearing on 17/02/2014 and on the said day the hearing began and again the Appellants did not complain about any statements. They participated in the trial and when they were put in their defences they tendered their defences and thereafter the second Appellant indeed filed written submissions. Apart from the issue of statements having been raised on 23/12/2013 and the matter having come up in Court severally, none of the Appellants raised the matter again and not even in the written submissions. The other time that matter came up was in the Petitions of Appeal as a ground. That ground was not even canvassed in the Appellants' submissions before us. We therefore find no basis of inferring that the Appellants were not availed with the statements.

e. <u>**On failure of witnesses to testify:-**</u>

37. On the allegation that the prosecution did not avail the people who were with PW3 as witnesses, we take refuge in **Section 143 of the Evidence Act,** Cap. 80 of the Laws of Kenya which provides that:-

> ***"No number of witnesses shall in the absence of any provision of law to the contrary be required for the proof of any fact."***

We are however alive to the holding in the case of <u>**Bukenya and Others versus Uganda (1972) EA 549**</u> for the propositions that, the prosecution must make available all witnesses necessary to establish the matter even if their evidence may be inconsistent; that the Court has the right and the duty to call witnesses whose evidence appears essential to the prosecution of the case; and lastly that where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution. In this case, the prosecution called several witnesses and adduced sufficient evidence in proof of the charge notwithstanding the absence of some of the people who were with PW3 during the arrest of the Appellants and the recovery of the phone. We so find.

<u>**DISPOSITION:**</u>

38. On the re-evaluation of the evidence and looking at the various issues raised by the Appellants and the Learned State Counsel in this appeal as so considered hereinabove, we are but unable to find that the trial Court erred in the finding of the Appellants guilty as charged and consequently convicting and sentencing them in accordance with the law. As there is no illegality on the sentence meted on the Appellants, their appeals lack any legal leg to stand on and are for rejection. The appeals are hereby dismissed accordingly. Right of appeal within 14 days from today.

Orders accodingly.

DELIVERED, DATED and SIGNED this 31st day of July, 2015

R.N. SITATI	**A. C. MRIMA**
JUDGE	**JUDGE**