REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 163 & 164 OF 2012

REUBEN CHEGE MBURU……...……1ST APPELLANT

PAUL NGANGA MBURU.....……...2ND APPELLANT

VERSUS

REPUBLIC……..……PROSECUTOR

(Being an appeal from Original Conviction and Sentence in the Chief Magistrate's Court Criminal Case No.131 of 2011 Milimani Law Courts, Judgment of Hon Gicheha, CM delivered on the 16th day of December, 2011).

JUDGEMENT

The Appellants, Reuben Chege Mburu and Paul Nganga Mburu were charged with ten counts of robbery with violence contrary to Section 296(2) of the Penal Code.

The particulars of count I were that on 25th January, 2011 along Limuru Road within Nairobi County jointly with others not before court while armed with dangerous weapons namely pistols robbed Peter Migwi Kagiri of a Motor Vehicle Registration No. KBH 504X make Nissan Matatu valued at Ksh.1,150,000/=, a mobile phone make Nokia 1100 valued at Ksh.5,000/=, a speaker valued at Ksh.7,000/=, one equalizer valued at Ksh.9,500/= and cash Ksh.1,000/= all valued at Ksh.1,172,500/= and at the time of such robbery used actual violence against the said Peter Migwi Kagiri.

In respect of counts II to X, the complainants were all passengers in Motor Vehicle Registration No. KBH 504X make Nissan Matatu. In count II, the complainant was Jackson Obote Ongo. He was robbed of two Nokia mobile phones valued at Kshs. 8500/=, a Techno mobile phone valued at Kshks. 3500/= and cash Kshs.7,000/= all valued at Kshs.19,000/=. In count III, the complainant was James Muturi Ndegewa. He was robbed of a mobile phone make Samsung E1210 valued at Kshs. 7,500/=. In count IV, the complainant was Daniel Njuguna Gitau. He was robbed of a mobile phone make Nokia 2760 valued at Ksh.4,500/= and cash Ksh.1000/=, all valued at Ksh.5,500/=. In count V, the complainant was Bob Onyango Ouko. He was robbed of a mobile phone make Nokia 1200 valued at Ksh. 4,500 and cash Ksh.2,600/=, all valued at Ksh.7,100/=. In count VI the complainant was Sarah Wangui Gicharu. She was robbed of a mobile phone make Techno valued at Ksh.5,900/= and cash Ksh.740/= all valued at ksh.6640/=. In count VII the complainant was Moses Wachira Kimani. He was robbed of a mobile phone make Nokia 2330 valued at Ksh.4,000/= and cash Ksh.1,600/= all valued at ksh.5,600/=. In count VIII the complainant was Charles Oluchili Tete. He was robbed of a mobile phone make Nokia 1208 valued at Ksh.6,000/= and cash Ksh.1,500/= all valued at Ksh.7,500/=. In count IX the complainant was Joseph

Musyoka Msee. He was robbed of a mobile phone make Nokia 2630 valued of ksh.5,800/= and cash Ksh.900/= all valued at ksh.6,700/=. In count X the complainant was Agnes Njeri Gichuhi. She was robbed of cash Ksh.400/=.

The Appellants were also separately charged in counts XI and XII with handling stolen property contrary to Section 322 (2) of the Penal Code. In count XI the 1st Appellant, Reuben Chege Mburu was alleged that on the 26th day of January, 2011 along Kirinyaga Road within Nairobi County, otherwise that in the course of stealing, dishonestly retained five mobile phones having reason to believe them to be stolen goods.

The particulars of count XII were that the 2nd Appellant, Paul Ng'ang'a Mburu on the 26th day of January, 2011 at Gathongora Area in Ruiru within Thika county, otherwise than in the course of stealing, dishonestly retained one Woofer Speaker, one equalizer and two mobile phones having reason to believe them to be stolen goods.

They were found guilty and convicted of counts 1, 2,3,4,5,6,7,8 and 10 and sentenced to suffer death. Being aggrieved and dissatisfied with both the conviction and sentence, they preferred this appeal. The 1st Appellant was represented in court by Ms. Betty Rashid while the 2nd Appellant was represented by Mr. John Swaka.

The two Appellants were jointly charged and they separately filed the respective appeals. Both appeals were consolidated for purposes of this judgment. Reuben Chege Mburu who was the 1st Accused is the 1st Appellant whilst Paul Ng'ang'a Mburu who was the 2nd Accused is the 2nd Appellant.

They relied on similar grounds of appeal which we condensed as follows. That;

> 1. ***The learned Magistrate erred in law and fact in failing to find that there was no sufficient evidence and proof to establish the ingredients of the charges against them.***
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> ***2. The learned Magistrate erred in law and fact in relying on identification that was faulty and occasioned prejudice to them.***
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> ***3. The learned Magistrate erred in law and fact in failing to find that the statement of facts read out and relied upon by the Prosecution could not sustain a conviction for the charge against them.***
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> ***4. The learned magistrate erred in law and in fact as she relied on extraneous considerations that were not before the court in securing a conviction against them.***
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> ***5. The learned magistrate erred in law and fact in failing to find that the Appellants' testimony unassailably contravened the Prosecution's evidence, irreparably dented the veracity of the Prosecution's case and irredeemably shook the credibility of the Prosecution's witnesses.***
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> ***6. The learned Magistrate erred in law and in fact in failing to take into account the Appellant's mitigation and to realize that it was exonerating them and therefore was incompatible with the their guilty.***
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> ***7. The sentence imposed by the learned Magistrate was manifestly excessive in the circumstances.***

The prosecution conceded to the appeal. Counsel for the State Mr. Muriithi urged that when the trial court was analyzing the evidence of identification, it noted that the Identification Parade rules were faulted and as such it could not rely on identification to convict the Appellants. He submitted that the Appellants were convicted on the basis of the doctrine of recent possession. Regarding the 1st Appellant, he referred the court to the evidence of PW17, a police officer who testified that the police received a tip

off that the stolen vehicle had been spotted along Kirinyaga Road. Counsel observed that the trial magistrate created doubts in her mind in that she reasoned that by the fact that the 1st Appellant was arrested on the date of the robbery in the motor vehicle, then, he must have been involved in the said robbery. He submitted that his alibi defense was neither dislodged nor dealt with in the Judgment and that therefore the magistrate ought to have acquitted him.

Regarding the 2nd Appellant, Counsel for the state referred to the evidence of PW16 who testified that he received information that motor vehicle registration number KBE 248G was carrying thugs. PW15 testified that he had hired out the said motor vehicle which he identified at a time when it was empty. Counsel further urged that there were two motor vehicles involved; the first one which the 1st Appellant was in and the second one, the KBE 248G. He submitted that PW15 testified that the KBE 248G was hired out to one Richard Munyua on the strength of a guarantee offered by the 2nd Appellant and that there was a car hire agreement in that regard. However, the car hire agreement was never produced. There was also no proof of the existence of a speaker that was allegedly stolen from motor vehicle KBH 504X. That break in the chain of events did not link the 2nd Appellant to the robbery. He referred to a ruling of the Court of Appeal, ***Criminal Appeal No. 247 of 2009 at paragraph 11*** which set out the principles to be considered for the doctrine of recent possession to apply. He submitted that none of the principles applied in the present case.

In conclusion, he noted that both Appellants advanced the defense of alibi. The 1st Appellant, he observed, stated that he was abducted by the police only to find himself at the police station. The 2nd Appellant on the other hand was rushing to work when he was arrested. The prosecution was required to disproof the same which it failed to.

This being the first appeal, we have to re-consider and re-evaluate the evidence adduced and arrive at our own independent decision whether or not to uphold the conviction of the Appellants. In drawing our own conclusions, we are cognizant of the fact that we neither saw nor heard the witnesses as they testified and must give due regard for that. See the case of ***Odhiambo vs Republic Cr. App No. 280 of 2004 [2005] 1 KLR.***

PW1, Peter Migwi Kagai was the driver of motor vehicle KBH 504X Nisaan Matatu. He testified that on the material date he collected passengers at Posta bus stage in Nairobi. Two passengers that were seated at the front seat turned against him at Fig Tree Hotel area. One of them was armed with a gun. They took over the vehicle and forced him to the rear seat. They drove the vehicle to a secluded place at Gachie where they ordered everyone out of the vehicle and robbed them of their personal belongings and left with the vehicle. He was robbed of Kshs.11,000/= and a mobile phone. They got assistance from the neighbouring homes and were able to call the police who came and took them to Gigiri Police Station where they learnt that one suspect had been arrested. The person was later placed in an identification parade where PW1 was able to identify him having seen him in the matatu with the help of the light inside it. His phone was also recovered from him. The motor vehicle was recovered but it had been vandalized. PW1 was taken to Ruiru Police Station where another identification parade was carried out and he was able to identify the 2nd Appellant. He testified that the 2nd Appellant is the one who took over the motor vehicle during the robbery. He remembered that the 1st Appellant is the one who brandished a gun at him.

PW 2, Joseph Irungu was the conductor of the said matatu. It was his evidence that when they reached at Fig Tree Hotel he saw a person come to the driver's side and take over the matatu. He questioned the person what he was doing and he told him that he was helping the driver. He realized that the vehicle had been diverted to a different route; that is Limuru Road instead of Murang'a Road. When he questioned again why the matatu was moving towards the wrong direction, he was told that the road was blocked. He noticed one of the persons in the front seat had a gun. He quickly jumped out of the matatu and with the help of a good Samaritan, was taken to Gigiri Police Station where he reported the incident. As he waited outside the police station, he saw the passengers who were in the vehicle coming to the Police Station. It was passed 1.00 a.m. He wrote his statement and left. On the following day, he learnt that someone had been arrested. He was able to identify the suspect in an identification parade that was conducted at Ruiru

Police Station. The suspect was the 2nd Appellant whom he had spoken to before they boarded the matatu.

PW3, Agnes Njeri Gichuhi was a passenger in the matatu. It was her evidence that during the robbery the 1st Appellant came to the rear cabin of the matatu to collect money and phones from the passengers and he slapped her when she said she did not have a phone. On realizing that they were under an attack, the conductor jumped out of the vehicle. PW3 had just given the conductor her phone to jump out with it. The matatu was then driven to a dark place where they were asked to remove their clothes and were frisked off their belongings. The robbers saw some light and decided to drive off leaving them behind. They got help from the neighbours and were able to go and report the incident at Gigiri Police Station. She took part in an identification parade conducted on the following morning where she was able to identify the 1st Appellant.

PW4, Sarah Wangui Gacharu was also a passenger in the same vehicle. It was her evidence that she was robbed of Kshs. 740/ and a Techno phone valued at Kshs. 7,900. She testified that the 2nd Appellant is the one who took her phone, while the one who took her money had a gun. She was able to identify her stolen phone as it had burnt marks.

PW 5, Jackson Obote Ongo was also a passenger in the said motor vehicle. He was robbed of a mobile phone make Nokia 2011 1680, Techno. His evidence was that it was the 1st Appellant who took his phone. He saw him wearing a yellow t-shirt with patches. The robbers drove the matatu to a dark place where they ordered everyone out of the matatu. It was from here that he managed to escape and go to Muthaiga Police Station where he reported the incident. Thereafter, together with a police officer decided to go and see the vehicle which he learnt had been recovered and was at Gigiri Police Station. On arrival at Gigiri Police Station, he was informed that someone had been arrested. He demanded to see the person and when the person was brought he recognized him as the 1st Appellant.

PW6, Michael Kinuthia Karanja testified as the owner of motor vehicle KBH 504X. He produced an agreement showing he had purchased the same. He also identified a Woofer speaker and an equalizer at Gigiri Police Station that were recovered having been vandalized from the vehicle by the robbers.

PW7, Moses Wachira was a passenger. He was robbed of a mobile phone Nokia 2330 as well as cash Kshs. 4,000/=. His phone was recovered. He identified it at Gigiri Police Station by looking at the ***ok*** key which had peeled off when it fell down. His testimony was that he did not bend his head when the robbers struck and was therefore able to see the 1st Appellant who was short like himself. He did not however see the 2nd Appellant.

PW8, Charles Oluchili Tete was a passenger. In corroborating the evidence of PW1,2,4,5,6 and 7 he testified that he was robbed of Kshs 1,500 and a mobile phone make Nokia 1280 by the 1st Appellant. He took part in an identification parade in which he was able to identify him.

PW9, 10 and 12, Daniel Njuguna Gitau, James Munene Njuguna and Bob Onyango Ouko respectively were also passengers in the matatu. PW9 was robbed of Kshs. 1,000 and a mobile phone make Nokia 2760. His phone was recovered and was able to recognize it as it was still new. PW10 lost a mobile phone make Samsung E1210 as well as a wallet which had in it his PSV licence and an ATM card. He was called to Gigiri Police Station and was able to identify the phone. PW12 lost a mobile phone make Nokia 1200 and cash Kshs.2,600/=. His phone was also recovered. However it did not have the rear cover. He was however able to identify the 1st Appellant in an identification parade that was conducted at the Police Station.

PW11, Doctor Zephania Kamau filled the P3 form for PW5 (Jackson Obote Ongo). He had sustained two small scars on the right side of head. He classified the degree of injury as harm.

PW13, Acting Superintendent of Police, Henry Kiambati conducted the Identification parade at Gigiri

police station. The same was in respect of the 1st Appellant. The witnesses Agnes Njeri, Charles Oluchili Otete and Joseph Irungu positively identified him. Other witnesses, PW1 and 12 also participated in the parade and they identified him.

PW14, Inspector Joseph Irungu carried out the Identification parade in respect of the 2nd Appellant at Ruiru Police Station. PW1, 2 and 4 were the witnesses and they all identified him.

PW15, Paul Jakaye Mbugua ran a car hire business. It was his evidence that two people namely, Paul Mburu, the 2nd Appellant herein and one Richard Munyua approached him with a request to hire a motor vehicle KBE 248G to attend a burial. They paid Kshs. 3,000/= to take the vehicle for 24 hours. He took a copy of Richard Munyua's driving licence and identity card. The 2nd Appellant was to act as a guarantor. He knew him before as he was a conductor on matatu Route 108. On 26th January, 2011, he received a telephone call and was informed that there was a police officer who was looking for him as his vehicle had been involved in an accident. The accident had occurred when the vehicle was being chased by the police as it was suspected to have been involved in a robbery. He was informed that the vehicle was at Ruiru Police Station parking yard. On arrival at the Police Station, he confirmed that indeed the vehicle had been involved in an accident and had damages. He also found the 2nd Appellant at the Police Station.

PW16, Senior Sergeant Richard Rono of Ruiru CID office testified that on 26/1/2011 while on duty with his colleagues received information that there was motor vehicle Toyota Premio grey in colour, registration KBE 248 G that was carrying thieves. They tracked it along Thika Road. They attempted to stop it in traffic but it drove off and sped towards Nairobi. They followed it and saw it veer off the road and roll. Two people came out of it. They gave a chase and managed to arrest one of them, the 2nd Appellant herein. They also recovered a motor vehicle speaker and an equalizer from inside the car. The motor vehicle was towed to Ruiru Police Station where an inventory of the recovered items was made. From the record, the items included a techno mobile phone, a Nokia mobile phone as well as a Woofer speaker and an equalizer. The suspect then signed the said inventory and was thereafter charged accordingly.

PW17, Corporal Onyango Awede was the investigating Officer in the case. He received information that a Nissan Matatu vehicle registration number KBH 504X had been carjacked and was being driven towards Gigiri. He relayed the information to his crew who were on duty and they concentrated their efforts to pursuing the vehicle towards Ruaka and Gachie areas. He later received information that the officers had sighted the vehicle heading towards Limuru and they decided to pursue it along Limuru Road and then Ngara area. They proceeded to Ngara where they flagged the motor vehicle along Kirinyaga Road. The vehicle stopped and they arrested the driver who told them that he had just been released by the robbers and was trying to find his way out of town. They arrested him and recovered among other things six mobile phones. He made an inventory and the suspect signed and thumb printed it. He was taken to Gigiri Police Station where he was subjected to an identification parade and was identified by the victims who participated in it. The mobile phones that were recovered were identified by the various complainants.

The Appellants chose to give sworn evidence in their defenses. The 1st Appellant in his defence stated that on the fateful day, he was on his way home after taking a drink when three men came out of a vehicle and started beating him up. They put him inside the vehicle and demanded for Kshs 50,000/= to secure his release. They then took him to the police station and he later found himself in court. He denied any knowledge of the robbery.

The 2nd Appellant also gave sworn evidence in which he averred that he was on his way to work when a vehicle came in front of him and three people jumped out of it. They got hold of him, put him inside the vehicle and took him to the police station where he was charged with the offences. He also denied any knowledge of the offences.

Counsel for both Appellants filed written submissions. They raised more or less similar issues. Those for the 1st Appellant were dated 12th October, 2015 and were filed by John Swaka Advocate. He submitted

that the Appellants were not properly identified because the passengers who were in the vehicle did not describe the intensity of the light that was in the motor vehicle during the robbery. They did not also properly describe what the attackers were wearing. He pointed out that PW1 and 2 gave contradictory evidence in respect of what the attackers were wearing. As for PW1, he testified that the 2nd Appellant was wearing shorts and a T - Shirt. PW2 on the other hand testified that he was only wearing shorts. Further, he submitted that the learned trial magistrate did not properly apply the doctrine of recent possession, the basis on which the Appellants were convicted. He added that there was no proof that the Appellants had participated in the robbery although the recovered goods were found in their possession. On the whole, it was the submission of the counsel that the case was riddled with poor investigations and insufficient evidence that could not found a basis for a conviction.

On behalf of the 2nd Appellant, learned counsel Ms. Betty Rashid filed written submissions dated 10th September, 2015. Her submissions were that the 2nd Appellant was not properly identified, his alibi defence was not dislodged, that the evidence of the prosecution witnesses was insufficient, that the doctrine of recent possession was not properly applied by the learned magistrate and that the 2nd Appellant was not accorded a fair trial because he was not furnished with the prosecution witness statements before the commencement of the trial contrary to **Article 50(2) (c) and (j) of the Constitution**.

Having considered the evidence on record and the submissions by the Appellants' counsel and those of the Respondent, we have summarized the main issues for determination to be whether the case was proved beyond all reasonable doubts and whether the 2nd Appellant's right to fair trial was violated. From a summary of the judgment of the learned trial magistrate, it is clear that she convicted the Appellants on the ground that they were found in possession of some of the stolen goods, specifically, the mobile phones belonging to the passengers together with a Woofer speaker and an equalizer that were allegedly vandalised from the robbed of matatu. But before we focus our minds on whether the learned trial magistrate properly convicted the Appellants, it is important that we relook at the evidence on identification. We are of a concurrent mind with the trial magistrate that the identification of the Appellants in the two identification parades carried out could not found a ground for their conviction. According to the investigations, they were charged because most of the passengers identified them in the respective identification parades conducted at both Gigiri and Ruiru Police Stations. That in respect of the 1st Appellant was conducted at Gigiri Police Station. According to PW5, who was one of the witnesses in the parade, he was shown the Appellant before he was asked to identify him in the presence of all the other passengers who were also witnesses in the said parade. Therefore, notwithstanding that other witnesses testified that they had not seen the 1st Appellant before they were asked to identify him, their evidence was definitely discredited and shredded by the contrast version of the testimony of PW5. It followed then that that identification parade was bungled as one of the cardinal rules in an identification parade is that the witness should not see the suspect before he is asked to identify him.

With respect to the identification parade of the 2nd Appellant, the same was conducted at Ruiru Police Station. The witnesses called therein to identify him with the exception of PW1 testified that he was wearing shorts and a T-Shirt. PW1 who was the key prosecution witness, testified that at the parade, the 2nd Appellant was wearing a trouser and a jacket. That again cast doubts on the truthfulness of the entire group of witnesses. Furthermore, from the evidence of the witness who supervised the parade being PW14, he did not testify that the 2nd Appellant changed clothes in the middle of the parades. We are of the view once again that the identification parade in respect of the 2nd Appellant was also bungled and therefore not credible as to link the 2nd Appellant to the offence.

Any other evidence relating to the identification of the Appellants concerned what the passengers said they saw when they were being robbed. They testified that they identified the robbers with the help of the light inside the matatu. To us, this was a fallacy in that, first, none of those witnesses stated where the light was coming from. Secondly, they did not describe the intensity of the light that would have enabled them to identify their attackers. Thirdly, the physical description of the attackers was either lacking or wanting. We then hold that the identification of both Appellants was not without errors.

Turning on to the application of the doctrine of recent possession, according to PW16, the 2nd Appellant was arrested after motor vehicle KBE 248G veered off the road and rolled after which two persons came out of it. One of them was the 2nd Appellant. From the said motor vehicle, a Woofer speaker and an equalizer were recovered. These items had been vandalised from motor vehicle KBH 504X, the Nissan Matatu. PW16, did not however, state who amongst the two people who came out of the vehicle owned the same or was in actual possession of the same. The 2nd Appellant was linked to the vehicle by PW15 who ran a car hire business. His evidence was that he had hired the said motor vehicle KBE 248G to one Richard Munyua. The said Richard Munyua was guaranteed in the car hire purchase agreement by the 2nd Appellant, Paul Ng'ang'a Mburu. Unfortunately, and to the fatal blow of the prosecution's case, the car hire agreement was not produced in court. That then left a big gap that did not link the possession of the vehicle to the 2nd Appellant. Be that as it may, without the evidence of the capacity in which the 2nd Appellant was in the said motor vehicle, it was difficult for the learned trial magistrate to conclude that he was aware that the vehicle was ferrying stolen goods. Furthermore, apart from the physical identification of the said items by PW1, no documentary evidence was adduced linking the ownership of the items to PW1. Accordingly, it is our candid view that the 2nd Appellant could not, without a doubt, be linked to the robbery.

Turning on to the evidence against which the 1st Appellant was convicted, PW17, the Investigating Officer testified that after the police received information of the robbery of motor vehicle KBH 504X, he informed other police officers to be on the lookout. At about 12.30 a.m of the 26th January, 2011, he received communication from Special Crime Prevention Unit that the vehicle had been spotted in Ngara Area and was being driven towards the city centre. In a short while, the vehicle was spotted along Kirinyaga Road. It was stopped and the person driving it was the 1st Appellant. After he gave conflicting information of how he came about its possession and the police being doubtful of his story, arrested him and treated him as a suspect. It is from the said motor vehicle that six mobile phones that were wrapped in a polythene paper belonging to the passengers were recovered. They were identified by various passengers who in the previous night occupied the vehicle.

The learned trial magistrate in holding that the 1st Appellant was culpable on account of being in possession of the stolen mobile phones had this to say.

> ***"It has been proven that vehicle KBH 504X was the vehicle that was robbed from PW1 on 25th January, 2011. We have the evidence of all 15 passengers who were passengers in the said vehicle who say they were abandoned by the robbers at Gachie and the robbers drove off with the motor vehicle. We also have the evidence of the owner PW5 who confirms receiving a report that his vehicle had been stolen and recovered. He produced documents to show ownership.***
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> ***Therefore, if the 1st Accused was arrested in the same motor vehicle on the same day, it meant he was involved in the said robbery or if not, having been found in possession of he said vehicle, he ought to have an explanation. I have considered his defence in his defence, he does not mention having been found in the vehicle. He avers he was abducted by the police and he found himself in the cells being charged with an offence he did not know."***

In making the above finding, the learned trial magistrate failed to address herself to the fact that in the first instance, the 1st Appellant was not properly identified in the identification parade. Based on that evidence alone, it was factual that there was a doubt that he had participated in the robbery. Of course there was no doubt that the recovered motor vehicle had been stolen. But the mere fact that the 1st Appellant was driving it was not, of itself, sufficient evidence that he had stolen it. Furthermore, although six mobile phones were recovered in the vehicle, and were purportedly identified by the passengers, based on the fact that doubts were cast that the 1st Appellant participated in the robbery, the same benefit ought to have accrued in respect of the recovery of the mobile phones.

It is our view that the learned magistrate did not properly apply the doctrine of recent possession as was

annunciated in the case of **Malingi vs Republic [1989] KLR 225** where the Court of Appeal stated as follows:

> ***"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 prosecutions 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 it 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 as 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 first two tests set out in that case law apply herein as indeed, the motor vehicle and the mobile phones had been stolen. They were also recovered within a very short period, only hours after the robbery. However, from the co-existing circumstances of this case, being that the 1st Appellant was not properly identified, the doctrine of recent possession could not apply. That is to say that, the prosecution did not rebut the fact that there was no sufficient evidence linking the 1st Appellant to the robbery for want of positive identification.

On whether the 2nd Appellant's Constitutional right to a fair trial was violated, his counsel referred this court to **Article 50(2) (c) and (j) of the Constitution**. The same provide as follows;

> **"50(2) Every accused person has a right to a fair trial, which includes the right-**
>
> **(c) to have adequate time and facilities to prepare a defence;**
>
> **(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence."**

A perusal of the record of proceedings shows that the Appellants first took plea on 23 July, 2010. The charge sheet was substituted on 10th February, 2011. They took plea afresh and the court ordered that they be furnished with a copy of the charge sheet and prosecution witness statements. The hearing was set for 10th March, 2011. On this date prosecution was not ready to proceed and the matter was adjourned to 22nd March, 2011. The court made an order that the Appellant be furnished with a copy of the charge sheet and witness statements. A mention was set for 24th March, 2011. The main hearing was set for 14th April, 2011. On this date, the prosecution was granted the last adjournment. Although there were 5 witnesses in court, the trial could not proceed because the Appellants had not been furnished with the witness statements. The court therefore ordered that the Appellants be furnished with the prosecution witness statements. Actual hearing commenced on 31st May, 2011 when PW1 testified. On this date the Appellants did not complain that they had not been furnished with the prosecution witness statements. Learned counsel Mr. Swaka was in attendance for both Appellants. A similar scenario is represented by proceedings of 8th August, 2011 when PW2 testified in the presence of Mr. Swaka for both Appellants. Up to the time the prosecution closed its case, no complaint had been made by the Appellants that they had not been furnished with the prosecution witness statements. It is safe then to conclude that they agreed to proceed with the hearing because the witness statements had been furnished to them. We then find the submission by counsel for the 2nd Appellant that the 2nd Appellant's Constitutional right to a fair trial was violated to be without merit.

Although both Appellants gave alibi defences which were not corroborated, it is trite that the prosecution did not rebut them as is required by the law. The prosecution failed to discharge its burden in proving the case beyond all reasonable doubts. This appeal must then succeed. We quash the conviction, set aside the death sentences and order that the Appellants be and are hereby set free unless otherwise lawfully held.

DATED AND DELIVERED THIS 25TH DAY OF NOVEMBER,2015

J. WAKIAGA

JUDGE

G. W. NGENYE - MACHARIA

JUDGE

IN THE PRESENCE OF:

1. The 1st Appellant in person.

2. The 2nd Appellant in person.

3. Miss Atina for the Respondent.