



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL APPEAL NO 79 OF 2012

Appeal from the original conviction and sentence by Mwingi Principal Magistrate (Mr. H. M Nyaberi) in Criminal Case No 241 of 2012

PETER MUTHUI MUTINDA.....1ST APPELLANT

JOHNSON MUTHUSI MUTINDA.....2ND APPELLANT

JAMES MUSEE MWOVE.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Background

Peter Muthui Mutinda, Johnson Muthusi Mutinda and James Musee Mwove, 1st, 2nd and 3rd Appellants respectively, were charged in the lower court with robbery with violence contrary to section 296 (2) of the Penal Code. They appeared as 1st, 2nd and 3rd accused persons in the order in which they appear in this appeal. It was alleged that on 9th March 2009 at Makutano village, Mwalali sub-location Mbuvu location in Nguni Division Mwingi District within Eastern Province, being armed with dangerous or offensive weapons namely knives robbed Theophilus Mutinda Sua of cash 325,700/- and mobile phone make Motorola valued at Kshs 2,600/- all valued at Kshs 328,300/- and at or immediately before or immediately after the robbery stabbed the said Theophilus Mutinda Sua.

Originally there were Criminal Appeal No 79 of 2012 and No 79A of 2012 in respect of the 1st Appellant; Criminal Appeal No 77 of 2012 and No 81 of 2012 in respect of the 2nd Appellant and Criminal Appeal No 78 of 2012 and No 82 of 2012 in respect of the 3rd Appellant. The reason for multiplicity of files is that the appellants had each filed petitions of appeal in person. M/s Musyoka & Muigai Advocates also filed petitions of appeal in respect of each appellant. All the files were consolidated on 30th October 2013 into one file, Criminal Appeal No 79 of 2012.

Petition of Appeal

All the three appellants have advanced similar grounds of appeal. We have captured them in plural in this judgment, namely:

- i. **That the learned Magistrate erred in law and in fact in finding the appellants guilty as**

- charged.
- ii. **That the judgement of the court was against the weight of the evidence recorded.**
 - iii. **That the judgement of the court is founded on evidence which is inconsistent and mulled up (sic).**
 - iv. **That the appellants' evidence was not considered by the court.**
 - v. **That the learned Magistrate considered matters that he ought not to have considered and failed to consider matters that he ought to have considered.**
 - vi. **That the learned Magistrate erred in law and in fact in failing to consider that each of the appellant was a first offender.**
 - vii. **That the judgement of the court and the sentence awarded are based on wrong principles.**

Submissions by the Appellants

On the issue of recognition and identification, Mr. Muigai for the appellants submitted that it is settled law that where a conviction rests wholly or partially on identification or recognition the trial court must warn itself; that even the most honest witness can be mistaken; that although recognition is preferred, witnesses can be mistaken even of close relatives and that courts need to carefully scrutinize evidence of identification to rule out error. Counsel submitted that this cannot be said of the judgment of the trial court where the learned magistrate only considered the evidence. It was submitted that only PW1 and PW3 said they identified the attackers and their evidence is contradictory with PW1 saying the attack took 20 minutes while PW3 said it took 2 minutes; that both witnesses said the incident took place at night and the only source of light was moonlight without specifying how bright the moonlight was; and that moonlight is a poor source of light especially when one is terrified.

It was further submitted that PW1 and PW3 said they recognized voices of the attackers and therefore it was necessary to lead evidence to show how long the witnesses and the appellants interacted; that words uttered were very few and there is no evidence that 1st and 3rd Appellants uttered any words. It was submitted that PW1 and PW3 went to seek help from PW8 and if they really knew the 3 appellants they would have named them to PW8 instead of saying they were robbed by three persons.

It was submitted that the only time PW1 and PW3 talked about the appellants is after they found them arrested and therefore they identified those arrested and not the people who had robbed them.

Counsel relied on the following cases in support of the submissions on recognition and identification:

- i. **Wamunga v Republic in Criminal Appeal No 20 of 1989**
- ii. **Mwenda v Republic in Criminal Appeal No 51 of 1989**
- iii. **E.O.O & Patrick Mogaka Ongubo v Republic in Criminal Appeal No 197 2008**

On the issue on the doctrine of recent possession, counsel submitted that in order to return a conviction basing on this doctrine there must be prove of possession; property must belong to the complainant and it must have been recently stolen as laid down in **Richard Oduor Adera v Republic [2010] eKLR**. It was submitted that the mobile phone produced by PW10 in court as an exhibit was a Nokia C10 while the stolen phone was a Motorola and therefore there was no nexus with the offence; that it is not denied that there was money found with the appellants; that money has no distinguishing mark unless serial numbers are given it cannot be said with certainty that the money belongs to the complainant.

It was submitted that the charge sheet does not give the currency of the money but only shows amount allegedly stolen; that the 1st and 2nd appellants had reasonable explanation why they had the money with them that they were carrying the money to take their father to hospital; that this evidence was not rebutted; that Section 212 CPC requires rebuttal evidence and the prosecution brought in PW13 from Mwingi District Hospital who testified and produced the records of their father but this could not be ascertained that this is the same person as appellants' father; that the prosecution failed to produce the register to confirm this because this evidence would have been adverse to their case. Counsel relied on **Criminal Appeal No 68 of 1972, Bukenya & Others v Uganda** on this point. Counsel submitted that there are doubts and that in **Criminal Appeal No 100 of 1975, Kipsaina v Republic** the court held that

there must be reasonable doubts even if the court does not believe it.

On the recovery of the items from the appellants, it was submitted that PW9 did not prepare an inventory as required by Forces Standing Orders; that it is not enough to record this on the OB; that PW9 counted money with the members of public as this would introduce tampering with the exhibits and creates doubts.

It was further submitted that the 3rd appellant was arrested from his house after police alleged that they were lead their by the 1st and 2nd appellants and that the trial magistrate was wrong in finding that a case had been established against the 3rd appellant. Counsel finally asked this court to address the issue of the death sentence in view of Article 20 of the Constitution.

Submissions by the Respondent

The Respondent has opposed the appeal. Mr. Mailanyi for the State submitted that the findings of the trial magistrate are based on law and that the appellants did not give a reasonable defence; that the appellants were properly identified by PW1, PW2 and PW3; that on the night of the robbery there was moonlight that enabled PW1 to see the 3rd accused (now 3rd Appellant); that one could see 30 metres away; that the conditions were favourable for positive identification; that PW1 was able to identify the white trouser pocket where the money was and that possession of the cash and torn trouser pocket by the accused persons places 1st and 2nd appellants at the scene of the robbery and corroborates the evidence of PW3; that PW1 identified the 3rd Appellant during the identification parade and because he is the person who ran away from PW1 did not have a chance of seeing him at the place of arrest. Counsel further submitted that there was no need of identifying 1st and 2nd Appellants at the identification parade because they had been seen by the witnesses after their arrest; that PW3 saw the 3rd Appellant with the knife during the robbery and she knew 1st and 2nd Appellants' names; that the appellants did not have reasonable explanation why they had in their possession the torn white trouser pocket with money.

Counsel relied on **Criminal Appeal No 175 of 2003 Stephen Njenga Mukiria & Another v Republic** and **Criminal Appeal No 74 of 2005 Francis Ndingu Warari & 2Others v. Republic** on both issues of identification and doctrine of recent possession. He further submitted that all the elements of recent possession were satisfied.

On sentencing counsel submitted that death sentence is legal by dint of Article 26 of the Constitution and Section 296 (2) of the Penal Code and it is mandatory and therefore the court has no discretion in the matter. On this issue counsel cited the case of **Charo Ngumbao Gugudu v Republic Criminal Appeal No 358 of 2008** in which the Court of Appeal stated that maximum sentence should only be meted out to the worst of offenders.

On defective charge counsel submitted that the total value of the stolen items is given in Kenya shillings and that this is a small error curable under Section 382 of the Criminal Procedure Code. Counsel further submitted that the prosecution rebutted the defence evidence that they were going to hospital to take the money recovered from them to their sick father.

Facts of the case

Theophilus Mutinda Sua, PW1 and his wife Florence Taabu Mutinda, PW3, were walking home at about 9.00pm on 9th March 2009. It had been a market day at Nguni and PW1 had sold 13 head of cattle. He was carrying the proceeds of the sale, Kshs 325,700/-, on his body safely tucked away inside the pocket of his shorts worn under the long trouser. They met a tall man who was later identified as the 3rd accused (3rd Appellant) who greeted them and asked them if they has seen a stray cow. PW1 answered to the greetings and told the 3rd Appellant that they had not seen any cow. The 3rd Appellant immediately removed a knife and attacked PW1 threatening to cut him. He ordered PW1 to lie down and surrender all the money.

The 2nd Appellant joined in the attack and stepped on PW1's legs. Both searched for the money and cut the long trouser near the pocket and the front pocket of the shorts he was wearing under the long trouser and took the money. They also took Kshs 700/- from his shirt pocket and a Motorola C123 mobile phone. PW1 was stabbed on the head when he attempted to raise his head to look at the attackers. All this time the 1st Appellant was guarding PW3.

Patrick Manandu, PW2, was asked by Bosco Muema, PW7, to go pick some three passengers who had called him asking to be picked from a place known as Kiwanza. PW2 asked Kithome Ngonde, PW4, to accompany him to pick the passengers. Before going to pick the passengers, PW4 received information of the robbery and the general area where the robbers were which happened to be the same area where the said passengers were. PW2 and PW4 were suspicious of the passengers who needed transport. They discussed the matter and decided to report to the police at Nguni Patrol Base.

Police Constable Lufas Njagi, PW9, Corporal James Mureithi, PW10 and Police Constable Johnson Omwoyo, PW12 teamed up with PW2 and PW4. PW9 and PW10 were carried in the motor cycle ridden by PW4 while PW12 was carried by PW2. The three officers remained behind and told PW2 and PW4 to go and bring the passengers. PW2 and PW4 returned with the passengers with the 1st and 3rd Appellants being carried by PW4 while the 2nd Appellant was carried by PW2. The police pounced on them and arrested the 1st and 2nd Appellants. The 3rd Appellant escaped. After a search Kshs 41,700 and a mobile phone Nokia were recovered from the 1st Appellant and Kshs 87,000 wrapped in white shorts pocket and a knife wrapped in marvin hat were recovered from the 2nd Appellant. The 3rd Appellant was arrested at his home on 10th March 2009 at 4.00am.

The Appellants denied attacking PW1 and PW3 and robbing PW1. The 1st Appellant told the lower court that he spent 9th March 2009 at Mwingi District Hospital with his sick father and went home at 8.30pm. He said that he received a call from his sick father at 9.00pm informing him that the doctor had recommended that his father be transferred to Kenyatta National Hospital and he took Kshs 70,000 and mobile phone and went to see his brother the 2nd Appellant. He took one Musemba Muthusi whom he referred to as his servant. He called PW7 and asked for two motor cycles. With the 2nd Appellant and Musemba Muthusi they boarded the motor cycles but were stopped by the police after moving for 200 metres who arrested him and the 2nd Appellant while Musemba Muthusi escaped. The police took his money and the mobile phone, Nokia 1600.

The 2nd Appellant testified that the 1st Appellant and his uncle Musemba Muthusi went to his home and informed him about the call from their father's transfer to Kenyatta National Hospital; that after boarding motor cycles and travelling for 200 meters they were stopped and arrested by three people wearing civilian clothes; that the three took his Kshs 56,700 and 1st Appellants Kshs 70,000 and Nokia phone; that Musemba Muthusi escaped.

The 3rd Appellant denied robbing PW1. He also denied that he was with the 1st and 2nd Appellants on 9th March 2009. He denied he is not the person who escaped during the arrest of 1st and 2nd Appellants.

Determination

We are alive to the duty placed on this court sitting on first appeal to examine all the evidence afresh and re-evaluate the same with a view to arriving at an independent finding. To our understanding, two main grounds are raised in this appeal, namely:

- i. identification and recognition of the appellants
- ii. doctrine of recent possession

This court has also been asked to address the issue of mandatory death sentence in view of Article 26 of the Constitution.

The evidence of PW1 and PW3 is crucial in determining identification and recognition of the appellants. PW1 identified the tall man who attacked him first as the 3rd accused in the lower court and the 3rd appellant before this court. He said this is the man who removed a knife and threatened to stab him (PW1). He ordered PW1 to lie down and surrender all the money. PW1 identified the 3rd appellant by help of moonlight and according to him the 3rd appellant was wearing a marvin hat. PW1 stated that the 2nd appellant stepped on his legs while lying down. The 2nd appellant was known to PW1 as a neighbour since 2000 and thereafter they used to meet in the market where the 2nd appellant used to sell knives.

Further evidence from PW1 is that the 1st appellant was guarding PW3 and that after the 2nd and the 3rd appellants ran away, the 1st appellant walked towards PW1 and PW1 identified him as Peter Muthui Mutinda. He was known to PW1 since 2000 and in 2004 and 2005 they used to meet in the cattle market.

PW3 identified the 3rd accused now 3rd appellant, as the person who greeted them and attacked her husband. She testified that she screamed and that two men emerged from both sides of the road. One of them, identified as 1st appellant, went after her telling her to keep quiet or he kills her and that the 1st appellant was holding a knife. She testified that the 2nd appellant went to where PW1 was lying down and stepped on his legs. She said she knew 1st and 2nd appellants before and that they came from the same village and used to go to school and church together. She said she knew the 3rd appellant as well and used to see him. She said she saw the appellants by aid of the moonlight and that it was a full moonlight and one could see about 30 metres away.

Other than the evidence of the PW1 and PW3 on identification of the appellants, PW2 testified that he carried the 2nd appellant with his motor cycle that night while PW4 carried 1st and 3rd appellants. PW4 confirmed carrying 1st and 3rd appellants. He also confirmed that the 1st appellant was arrested by PW12 while the 3rd appellant escaped. PW12 confirmed arresting the 1st appellant and conducting a search on the 1st appellant. Kshs 41,700 was recovered from him. The 2nd appellant was arrested by PW9 who recovered Kshs 87,000 wrapped in a piece of white pocket and a knife wrapped in a marvin hat.

Our reading of the judgement of the trial court reveals that the trial magistrate evaluated and addressed his mind to the evidence on identification. We quote him on page 105 of the proceedings where he states thus:

“I have considered the evidence of PW1 and PW3. It is not in dispute that there was moonlight on the material night. It is also acknowledged by the 1st and 2nd accused that they had been knowing (sic) the complainant for a long period of time and they had transacted in livestock business. It is the view of the court, that PW1 and PW3 did not have any difficulty in recognizing the 1st accused who had a brief conversation with them. They subsequently recognized the 2nd and 3rd accused. Besides, when the 1st and 2nd accused were arrested, they were found with cash, Kshs 87,000 and Kshs 41,700. The white cut pocket that was stashed with Kshs 87,000 was matching the remain of the complainant short trouser (sic).”

We wish to point out that it is not the 1st accused, now 1st appellant who held a brief conversation with PW1 and PW3 but the 3rd accused, now 3rd appellant. According to the evidence the 3rd appellant is the first person to meet the two witnesses and to ask them if they had seen a stray cow before attacking PW1.

We are alive to the fact that the trial magistrate did not go deeper to consider the legal principles on identification and recognition but we note that he was alert to the fact that other than the evidence that the appellants were known to PW1 and PW3 before the date of the offence, the 1st and 2nd appellants were found with the money whose possession they failed to explain.

We have reviewed the evidence. The robbery took place at night and the only source of light was the moonlight. PW3 testified that it was a bright moonlight and with the aid of its light one could see about

30 metres away. PW8 too testified to the brightness of the moon that night and estimated that one could see about 30 to 35 metres away with the aid of the moon that night. Counsel for the appellants has argued that PW1 and PW3 could not have identified the appellants by aid of moonlight and that the conditions were not favourable for positive identification.

We have read **Wamunga v. Republic** and **Mwenda v. Republic** above. Both cases dealt at length on the issue of identification of the appellants. Both cases have relied on **R v. Turnbull & Others [1976] 3 All ER 549**. We are live to the legal principles laid down in these cases and have cautioned ourselves on the dangers of relying on the correctness of the identification of the appellants. We have noted that the robbery must have taken longer than two minutes. The events described by PW1 and PW3 that the 3rd appellants greeted them, asked them whether they had seen his stray cow and then attacked PW1; that PW3 screamed and 1st and 2nd appellants emerged and joined in the attack as well as the frisking of PW1, the cutting of trouser pockets and finally the pocket of the shorts he was wearing and taking his money cannot have taken two minutes. It is not the same as snatching something and running away with it. In our view 20 minutes may have been longer than the robbers took but we take the view that the robbery took some considerable time to enable the two witnesses to see and recognize the appellants. It is not lost to us that the three appellants were known to the two witnesses before this day.

In addition to evidence that PW1 and PW3 recognized the appellants, there is evidence that after the 1st and 2nd appellants were arrested, a total of Kshs 128,700 was recovered from them. We note that evidence on the recovery of this money does not agree. PW12 testified that he arrested the 1st appellant whom he searched and found him with Kshs 41,700. PW12 testified further that PW9 arrested the 2nd appellant and recovered from him Kshs 87,000. PW10 who had accompanied his colleagues confirmed that from 1st appellant Kshs 41,700 was recovered and Kshs 87,000 was recovered from the 2nd appellant. However, PW9 testified that Kshs 41,700 was recovered from 2nd appellant and Kshs 87,000 from the 1st appellant. We are however of the view that this is not fatal to the prosecution case given that two police officers, PW10 and PW12 have confirmed the amount recovered from 1st and 2nd appellant.

Other than this contradiction, we have no doubt in our minds that some money was recovered from the 1st and 2nd appellants. They have explained in their respective defences that they had money on that date. The 1st appellant told the trial court that he had Kshs 70,000 he had carried to take to his father for medical treatment; that this money was from the proceeds of sale of his cattle at Nuu market. The 2nd appellant said he had Kshs 56,600 with him for the same purpose as the 1st appellant.

We have considered this defence in light of the prosecution case. We find that it does not add up. Given that the two appellants said they had picked that money shortly before they were arrested, we are not able to reconcile the fact that the money recovered from them was different amount, Kshs 41,700 and not Kshs 70,000 from 1st appellant and Kshs 87,000 and not Kshs 56,700 from the 2nd appellant.

We have found that the money, Kshs 87,000 was found wrapped in a piece of white pocket identified by PW1 as the one cut from his shorts when he was attacked. PW2, PW4, PW9, PW10 and PW12 all testified that the money was wrapped in a piece of white pocket. We find this evidence convincing to an extent that we can safely draw an inference, which we hereby do, that the 1st and 2nd appellants, having been arrested shortly after the robbery and having been found with money some of it still wrapped in the white pocket cut off from PW1's shorts, were among the three people who had attacked PW1 and PW3, cut the white shorts pocket of PW1 and stole his money.

We have also considered submissions that the attack took short time and few words were spoken and therefore PW1 and PW2 could not have recognized the voice of the 3rd appellant. We have taken into account that the 3rd appellant was someone known to the two witnesses prior to this robbery.

We have considered the defence of 1st and 2nd appellant. The 1st appellant admitted that he called PW7 looking for transport. He admitted to having been arrested by police while travelling on a motor cycle and

admitted that he was with the 2nd appellant his brother and a third person. We find evidence on this third person suspect. The 1st appellant referred to the third person as his servant known as Musemba Muthusi. From 1st appellant's evidence and that of 2nd appellant they were three, 1st appellant, 2nd appellant and this Musemba Muthusi. There is no evidence of a fourth person. However, he testified in chief that after the police arrested them he realized that his uncle namely Musemba Muthusi had escaped. There was no mention of an uncle before but of a servant. On cross examination he referred to Musemba Muthusi as his servant.

The 2nd appellant told the court that on the date in question, he left his house with the 1st appellant his brother and his uncle Musemba Muthusi and that Musemba Muthusi escaped after the police arrested 1st and 2nd appellants. On cross examination the 2nd appellant said his uncle Musemba Muthusi escaped when he and 1st appellant were arrested and further that while at the Ukasi Police Station his uncle Musemba was arrested.

We have considered this evidence and we find that we have no doubt in our minds that the Musemba Muthusi who is referred to as uncle and again as servant is the 3rd appellant. He was named by the 1st and 2nd appellants as the third person who had been with them and who had escaped. We are alive to the fact that nothing was recovered from him but we have taken into account evidence of PW1 and PW3 that he is the tall man who had accosted them prior to 1st and 2nd appellants' joining the attack.

We have compared the cited cases and we wish to distinguish this case with the cases cited in this case by the appellants. In the present case, PW1 and PW3 knew the appellants prior to the robbery. We have considered the submissions that the two witnesses did not tell PW8 the names of the attackers if it is true they knew them prior to this date. We find that although there is no evidence that PW1 and PW2 told PW8 the names of the attackers, we are convinced that the appellants were known to the two witnesses prior to the robbery and therefore this was a case of recognition. Even if we are to be found wrong on this one, we have examined and evaluated this evidence afresh and find that the appellants were found with some big amounts of money with them and some of this money was wrapped in the cut-off piece of PW1's shorts pocket. We find this conclusive evidence that the money was stolen from PW1 in the robbery.

On the issue of the doctrine of recent possession, we have noted that the trial magistrate did not consider it even though he had identified it as one of the issues under determination. In **Richard Oduor Adera v Republic, [2010] eKLR**. The Court of Appeal while citing **Issac Nanga Kahiga alias Peter Kahiga v. Republic, Criminal Appeal No 272 of 2005 (unreported)** had this to say on this doctrine:

“It is trite law that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first, that the property was found with the suspect, and secondly that, the property is positively the property of the complainant, thirdly 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 properties can move from one person to another. In order to prove possession, there must be acceptable evidence as to search of the suspect and recovery of the alleged stolen property, and in our view any discredited evidence on the same cannot suffice no matter how many witnesses”

Anyone found in possession of recently stolen property has a duty to explain how he came by the same. The 1st and 2nd appellants have explained that the money recovered from them belongs to them and that they were taking it to their sick father, named as Mutinda Mutwota, who had been admitted at Mwingi District Hospital. The prosecution called the evidence of Japhet Mwau Kange, PW13, to rebut the evidence of the sick father. He produced hospital records to show that a patient by that name had been admitted in Hospital on 11th February 2009, discharged on 12th February 2009; was readmitted again on 8th July 2009 and discharged on 21st July 2009. PW13 said there was no record to show that this patient was admitted in hospital on 9th March 2009 the date of the offence in this case. This evidence has been

attacked by counsel for the appellants in that this is a common Kamba name and the patient referred to by PW13 could have been anyone.

We take the view that the evidence that the 1st and 2nd appellants were taking money found on them to their sick father admitted at Mwingi District Hospital on 9th March 2009 is wanting. This is so because of the other evidence surrounding the circumstances under which the 1st and 2nd appellants were arrested and their doubtful defence as analyzed elsewhere in this judgement. We take the view that the prosecution rebutted the evidence that they were taking this money to their sick father.

We fault the trial magistrate for not evaluating the legal principles in the doctrine of recent possession. We find that the prosecution established that the stolen property, the money, was found with 1st and 2nd appellants; that the money was positively the property of PW1 and that it had been recently stolen, in fact a few hours prior to its recovery.

We find no merit in the contention that the charge was defective for not stating the currency of the money. While we note that it is not specified what currency was 325,700, the same charge gives a total of the value of the stolen property as Kshs 328,300. Besides the evidence is clear that the stolen money was in Kenya Shillings and this is how the appellants understood the case and the evidence. Of importance to us is the fact that the appellants were not prejudiced in any manner.

We have considered the submissions that the phone produced in court as an exhibit is a Nokia C10 instead of Motorola allegedly stolen from PW1 and therefore that this exhibit has no nexus with the offence. It is true the phone recovered and produced as an exhibit is Nokia C10 instead of Motorola C123. PW1 identified the Nokia mobile phone (Exhibit 6) but we did not find evidence from him identifying it as his stolen phone. At the end of his evidence in chief PW1 stated that **“the mobile phone and the balance of the money was never recovered (sic).”** In our view he can only mean his Motorola mobile phone. PW3 told the court in reference to the Nokia phone (Exhibit 6) **“I have never seen it and it does not belong to my husband.”** In view of this we find this submission without basis.

We have also considered the submission that the police allowed members of the public to tamper with the money recovered from the 1st and 2nd appellants thereby creating doubts. Our reading of the evidence does not reveal that any member of the public handled the money. The evidence shows, and so we understand, that PW9, PW10 and PW12 counted the money in the presence of the members of public and following the request by PW1 that the recovered money should be counted. The police did not prepare an inventory of the recovered items but we have taken into account that there were three police officers, PW1 and other people and we did not find any claim by the appellants that they lost any personal items in the process.

In our view therefore the evidence on record proves beyond reasonable doubt that the appellants are the robbers who attacked PW1 and PW3 and robbed PW1. We find that other than his failure to address the legal principles in the doctrine of recent possession, the trial magistrate directed his mind properly on the issues of identification by recognition although his handling of the doctrine of recent possession is wanting as we have explained. We also fault him for not addressing the defence of the appellants in critically. We find the grounds of appeal without merit and on our own analysis of the evidence and the legal principles involved come to a conclusion that there is ample evidence against the appellants.

Lastly we wish to address the issue of death sentence. For an accused person charged under section 296(2) of the Penal Code, it matters not whether one is a first offender or not. The sentence is one, that of death. Courts in this country have been divided as to whether they have discretion over the matter especially following the promulgation of the Constitution of Kenya 2010. This has now been settled by a bench of five Court of Appeal Judges in Joseph Njuguna Mwaura & 2 others v. Republic Criminal Appeal No 5 of 2008 whose views are captured thus:

“Should Kenyans decide that it is time to remove the death sentence from our statute books, then they shall do so through their representatives in Parliament. In the meantime, the sentence of death

shall continue to be imposed in case of conviction where the law provides.”

We need not say more on this matter.

In the end, therefore, this appeal is hereby dismissed. It is so ordered.

Dated and signed this 22nd November 2013

S.N.MUTUKU

W. KORIR

JUDGE

JUDGE

Dated and delivered this 9th December 2013

S. N. MUTUKU

JUDGE