Mohamed & 2 others v Republic (Criminal Appeal 117 of 2014 & 104 & 105 of 2017 (Consolidated)) [2025] KEHC 11939 (KLR) (Crim) (13 June 2025) (Judgment)

Neutral citation: [2025] KEHC 11939 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL 117 OF 2014 & 104 & 105 OF 2017 (CONSOLIDATED)

GL NZIOKA, J

JUNE 13, 2025

BETWEEN

ABDI MAJID YASSIN MOHAMED ..... 1ST APPELLANT

OAA ALIAS SA ..... 2ND APPELLANT

MUSHARAF ABDALLA ALIAS SHKRAI ALIAS SHARRIF ABDALLAH MUALIM ALIAS RASHID SWAITAN ALIAS ALI ALIAS BONNIE ..... 3RD APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against decision of Hon. L. Nyambura Senior Principal Magistrate (SPM) delivered on 20th September, 2012 and Hon. Andayi W. Francis, Chief Magistrate (CM) delivered on 1st August 2017 vide Criminal Case No. 1427 of 2012 at the Chief Magistrate's Court at Milimani Nairobi)

JUDGMENT

1. The 1st and 2nd appellant were arraigned before the Chief Magistrate Court at Milimani charged vide Criminal Case No. 1427 of 2012 with offences in a total of ten (10) counts as follows:

    a. Count 1: Being in possession of explosives contrary to section 29 of the *Explosives Act* (Cap 115) Laws of Kenya. The particulars are that on 14th September 2012 along 4th street second avenue in Eastleigh within Nairobi County, jointly with others not before the court they had in their possession four improvised explosive vests to wit 30kgs for unlawful object.

    b. Count 2: Being in possession of explosives contrary to section 29 of the *Explosives Act* Cap 115 Laws of Kenya. The particulars are that on 14th September 2012 along 4th street second avenue

in Eastleigh within Nairobi County, jointly with others not before the court they had in their possession two improvised explosive devices to wit 2kgs for unlawful object.

c. Count 3: Being in possession of explosives contrary to section 29 of the *Explosives Act* (Cap 115) Laws of Kenya. The particulars are that on 14th September 2012 along 4th street second avenue in Eastleigh within Nairobi County, jointly with others not before the court they had in their possession twelve live hand grenades unlawfully.

d. Count 4: Being in possession of ammunition without a firearm certificate contrary to section 4(2)(a) of the *Firearms Act* as read with section 3(a) of the *Firearms Act* (Cap 114) Laws of Kenya. That on 14th September 2012 along 4th street second avenue in Eastleigh within Nairobi County, jointly with others not before the court they had in their possession 481 rounds of 7.62mm special ammunitions without a firearm certificate.

e. Count 5: Being in possession of a firearm without a firearm certificate contrary to section 4(2)(a) of the *Firearms Act* as read with section 3(a) of the *Firearms Act* (Cap 114) Laws of Kenya. That on 14th September 2012 along 4th street second avenue in Eastleigh within Nairobi County, jointly with others not before the court they had in their possession a firearm to with an AK 47 S/No. 2039485 without a firearm certificate.

f. In count 6: Being in possession of a firearm without a firearm certificate contrary to section 4(2)(a) of the *Firearms Act* as read with section 3(a) of the *Firearms Act* (Cap 114) Laws of Kenya. That on 14th September 2012 along 4th street second avenue in Eastleigh within Nairobi County, jointly with others not before the court they had in their possession a firearm to with an AK 47 S/No. 56-3010957 without a firearm certificate.

g. Count 7: Being in possession of a firearm without a firearm certificate contrary to section 4(2)(a) of the *Firearms Act* as read with section 3(a) of the *Firearms Act* (Cap 114) Laws of Kenya. That on 14th September 2012 along 4th street second avenue in Eastleigh within Nairobi County, jointly with others not before the court they had in their possession a firearm to with an AK 47 S/No. ZA 36940 without a firearm certificate.

h. Count 8: Being in possession of a firearm without a firearm certificate contrary to section 4(2)(a) of the *Firearms Act* as read with section 3(a) of the *Firearms Act* (Cap 114) Laws of Kenya. That on 14th September 2012 along 4th street second avenue in Eastleigh within Nairobi County, jointly with others not before the court they had in their possession a firearm to with an AK 47 S/No. 19781h452h without a firearm certificate.

i. Count 9: Engaging in organised criminal activity contrary to section 3(a) as read with section 4(1) of the Prevention of Organized Crimes Act 2020. The particulars thereof were that, on 14th September 2012 along 4th street second avenue in Eastleigh within Nairobi County, jointly were found engaging in an organized criminal activity being members of the Al Shabaab an outlawed organized criminal group as per Kenya Gazette Notice No. 12585 of 2010.

j. Count 10: Being unlawfully present in Kenya contrary to section 53(i) (J) as read with section 53(2) of the *Kenya Citizenship and Immigration Act* No. 12 of 2011. That on 14th September 2012 along 4th street second avenue in Eastleigh within Nairobi being Somali nationals they were found unlawfully present in Kenya in contravention of the Immigration Act, in that they had no permit or pass to allow them to stay in Kenya.

2. The 1st appellant pleaded guilty to the charges in counts 1 – 9 and he was convicted and sentenced accordingly as follows: -

a. On counts (1), (4), (5), (6), 7, and (8) to serve seven (7) years imprisonment

b. On counts (2) and (3) to serve five (5) years imprisonment

c. On count (9) to seven (7) years imprisonment and in addition in default to serve one (1) year imprisonment

3. The trial court stated that it had considered the gravity of the offences and ordered that the sentences meted out run concurrently.

4. Be that as it may, the 2nd appellant pleaded not guilty to all the charges while the 1st appellant pleaded not guilty to count 10 of being unlawfully present in Kenya

5. In the meantime, the 3rd appellant was arraigned in court vide Milimani Chief Magistrate Criminal Case No. 1582 of 2012. Subsequently, on 31st October 2012 the two matters were consolidated wherein the Chief Magistrate Criminal Case No. 1582 of 2012 was withdrawn. The prosecution presented a consolidated and amended charge sheet with a total of 13 counts.

6. The 2nd and 3rd appellant were charged jointly in nine (9) counts, while the 1st and 2nd appellants were charged in 11 with the offence of; being unlawfully present in Kenya contrary to section 53(i) (J) as read with section 53(2) of the *Kenya Citizenship and Immigration Act* No. 12 of 2011. That on 14th September 2012 along 4th street second avenue in Eastleigh within Nairobi being Somali nationals they were found unlawfully present in Kenya in contravention of the Immigration Act, in that they had no permit or pass to allow them to stay in Kenya.

7. In addition, the 3rd appellant was charged with an additional offence in count 10; Failing to register as a Kenyan citizen contrary to section 14 (1) (a) of the *Registration of Persons Act* (Cap 107) Laws of Kenya. That in the 29th day of September 2012 at Saba Saba Area within Malindi County, being a Kenyan citizen aged over 18 years was found not to have applied for registration as a Kenyan citizen.

8. Similarly, the 2nd appellant was charged in two more counts with the following charges: -

a. Count 12: Giving false information to a person employed in the public service contrary to section 129(a) of the Penal Code (Cap 63) Laws of Kenya. That on 27th August 2012 at Pagan Police Station in Nairobi County he reported to No. 76xxx Alfred Baya a police constable attached at Pagani Police Station that he had lost a Kenyan identity card number 30xxx which was genuinely issued to him by the Registrar of Persons which information he knew or believed to be false thereby causing No. 76xxx police constable Alfred Baya to issue him with a police abstract an act the said officer ought to have not taken if he knew the true facts respecting which the information was given were known to him.

b. Count 13: Giving false information to a person employed in the public service contrary to section 129(a) of the Penal Code (Cap 63) Laws of Kenya. That on 31st August 2012 at Pumwani District Registration of Persons office within Nairobi County he reported to Mrs. Rose Bolo a public officer that he had lost his Kenya National identity card No. 30xxx which was genuinely issued to him by the Registrar of Persons which information he knew or believed to be false thereby causing Mrs. Rose Bolo to issue him with an application for registration acknowledgment slip S/No. 23xxx an act the said public officer ought to have not taken if she knew the true facts respecting which the information was given were known to her.

9. The charges were read to the appellants who pleaded not guilty to all them and the case proceeded to full hearing.

10. Be that as it were, on 14th January 2015, the prosecution filed a further amended charge sheet after its all its witnesses had testified but before the close of its case. The purpose of the amended charge sheet was to add the aliases of the 1st and 3rd appellant. Furthermore, the prosecutor withdrew the offence in count 9 against the 2nd and 3rd appellants. The charges were read to the appellants afresh and they maintained a plea of not guilty to all the charges.

11. The prosecution case was supported by the evidence of thirty-three (33) witnesses. In a nutshell, the prosecution case is that on the 18th August 2012, the 1st appellant went to plot number 36/1/1014 Eastleigh seeking for a single bedroom house to rent. That he met with (PW2) Francis Kairuki Kimani, the caretaker, who showed him house No. 1BR4 G and they agreed on monthly rent of Kshs. 15,000. The 1st appellant paid for the house and (PW2) Francis issued him with a receipt.

12. That on 13th September 2012 at about 10:00pm, (PW3) No. 88xxx PC Pius Ndiwa, (PW12) No. 23xxx Superintendent Eliud Langat and other officers from Starehe Criminal Investigation Department (CID) Police Station Offices were sent by their boss, the District Criminal Investigations Officer (DCIO) to go to the 1st appellant house on a special assignment, following reports that there were bombs in that house at Eastleigh.

13. That the officers left the office at about midnight and proceeded to Eastleigh 2nd Avenue 4th Street and were joined by Officers from the CID Headquarters including; (PW5) No. 74xxx PC Patrick Kyule. The officer formed two groups for the operation purpose, with one tasked to enter the premises and conduct the search while the other kept watch outside the house.

14. That (PW3) PC Ndiwa and (PW5) PC Kyule, entered the plot, proceeded to house number IBR4G and noticed the lights were still on and there were two people being the 1st and 2nd appellants sleeping on the floor. The officers knocked on the door and ordered it be opened, and the 1st appellant opened, both were handcuffed subjected to a body search but nothing was recovered.

15. That the CID officer proceeded to search the house and recovered from the kitchen; three (3) black suitcases, four (4) canvas bags and masking tape. That upon opening one (1) of the suitcases, they recovered a vest with hanging wire attached to a mobile phone, and immediately evacuated everyone from the house and called in (PW12) No. 23xxx SP Eliud Langat, a bombs expert.

16. PW12 SP Langat testified that when he entered the house he saw a device that he strongly suspected to be an explosive, wore his bomb attire and recovered four (4) improvised explosive devices (IEDs) in the form of suicide explosive vests. He described them as jackets with three (3) slabs on each with a mixture of explosives being T.N.T, RDX, PETN, components that are highly explosive with RDX being a primary high explosive. That each slab was glued with more than 2,300 ball bearings per vest for enhancing fragmentation effect by flying in all directions during explosion.

17. That there were three blasting caps on each vest to act as the primary source of detonation and each vest had two (2) rocker switches and a Nokia phone model 1208 and 9-volt super heavy-duty battery. That he disabled the vests by cutting a wire that came from the Nokia phone and taped the composition of the IED using electric tapes and all the blasting caps were secured with syringes.

18. That furthermore, there were two (2) other IEDs slightly different from the first four as each was hooked to a grenade fuse make F1 Russian defensive. In addition, there were also twelve (12) hand grenades, six (6) of which were F1 Russian grenades and the other six (6) Chinese 82-2.

19. The scene was secured, and the other CID officer and the 1st and 2nd appellant together with (PW7) No. 63xx Sargent Franklin Njuki from ATPU returned to the house. That (PW7) Sgt. Njuki prepared an inventory of the recovered items which was signed by (PW3) PC Ndiwa, PC Joseph Gikunda, and

the 1st and 2nd appellants in his presence. Thereafter, the 1st and 2nd appellants were escorted to the Provincial Criminal Investigation Office (PCIO).

20. That on 14th September 2012 at 9:00am, (PW33) Superintendent Josphat Bwomua Fedha, the Investigating Officer, was instructed by the Officer In-Charge, Anti-terror Police Unit, Boniface Mwaniki, to proceeded to the CID Headquarters and commence investigations in the matter.

21. That together with Cpl James Kengongo and Cpl Cyrus Ikende, they proceeded to the CID Headquarters where they convened a meeting of the security agencies and interrogated the 1st and 2nd appellants during which interrogations the 1st appellant mentioned the 2nd and 3rd appellants as his accomplices. That thereafter, 1st and 2nd appellants and the recovered exhibits were handed over to (PW33) SP Fedha, Cpl Ikande and Cpl Kengongo who escorted them back to ATPU Headquarters.

22. In the meantime, on 29th September 2012, (PW11) No. 23xxx Chief Inspector Kinoti Githinji from Malindi ATPU received information of a suspicious young man by the name of Ali Abdallah who had rented a house at Sabasaba area, Malindi. That he called (PW24) No. 88xxx PC James Maina Kimani and Cpl Mark Juma and they proceeded to the suspect's house but did not find him. However, upon inquiry they found the suspect the 3rd appellant at Mwananchi hotel and introduced himself as Ali Abdallah but when asked to produced his national identity card he stated he did not have it.

23. That the 3rd appellant was led by the officers to his house at Sabasaba where they recovered clothes and a deep freezer. (PW11) CIP Githinji took him to Malindi Police Station and interviewed him, and later secured a court order to hold him in custody for investigation. He transferred to CID Headquarters, in Nairobi.

24. According to (PW33) SP Fedha investigations revealed that four (4) house the 3rd appellant rented in Eastleigh, Umoja, Langata, Manyatta and Malindi spending Kshs. 125,000 a rent, though rented for use as a cereals shops but were in fact an armoury.

25. Further that, the 3rd appellant used different names at those rented places and left deposit totalling Kshs. 41,000. Furthermore, whenever he left a safe house he would inform the landlord that he was travelling to either Canada or France despite the fact that he did not have an identity card or passport.

26. (PW8) Chief Inspector Emmanuel Lagat, a firearms examiner at the DCI Headquarters gave evidence on the firearms recovered from the scene. He produced a report (exhibit 17) prepared by his colleague Lawrence Ndhiwa who was on urgent assignment. The report indicates that Ndhiwa examined 481 rounds of ammunition, four (4) rifles and 16 rifle magazines and noted that the ammunitions and rifles were capable of being fired. Further the 16 magazines were designed for use with AK 47 rifles and were in good working order.

27. (PW4) Oscar Crispus Opiyo a finger print officer with the National Registration Bureau, testified that he received a request from J. Bwonya of ATPU to conduct a search on the fingerprints of the 1st appellant. That the search from their database of fingerprints revealed that the fingerprints submitted were registered on 13th July, 2000 in the name of Haji Wali Ali, a registered refugee. That the said person applied for a Kenyan national identification card on two (2) occasions, on 7th April, 2007 and on 29th April, 2009 but both applications were rejected as he was an alien.

28. Further, (PW4) Opiyo received a request to conduct a search on the fingerprints of the 2nd appellant. However, the search in their records did not find any fingerprints matching the ones that he had been given.

29. (PW14) Superintendent Simon Murage based at ATPU Headquarters conducted the identification parade in respect to the 3rd appellant on 13th October 2012 at Kilimani Police Station. He testified that he instructed Corporal Rotich to arrange the members of the parade. He then explained to the 3rd appellant the reason of the parade and that he had a right to have a legal counsel or friend present but the 3rd appellant stated he did not require one.

30. That the first witness to the parade was (PW1) Josephat Waweru Gikinya identified the 3rd appellant by touching him on the right shoulder. That the 3rd appellant stated that he was satisfied with the manner in which the parade was conducted and signed the parade form.

31. At the conclusion of investigations, the appellants were arraigned in court charged with the offences as aforesaid.

32. At the close of the prosecution case, the appellants were placed on their defence. The 2nd appellant gave evidence through a sworn statement and stated that he lives in Eastleigh, 4th Street in a house called 2000. That, he was a student at Star Private College studying Mathematics and Languages.

33. That on the 13th September 2012, he left his house at 4:00pm and went for prayers at the mosque along 6th Street Eastleigh. That after prayers, he wanted to buy medicine for ulcers and took a red taxi from the mosque. That the taxi driver stopped at Hass Petrol Station along section 3 Eastleigh to fuel the vehicle.

34. However, before they left the petrol station a group of about five (5) police officers stopped them and accused them of stealing the motor vehicle. That the police officers put them in their motor vehicle and drove them to what seemed like a police station, where the driver of the taxi was left while he was blindfolded and returned to Hass Petrol Station where he was asked who the owner of the motor vehicle he was in was and he insisted that it belonged to the person left at the station.

35. That, he was bundled into the car and driven for a long time until arriving at a four (4) storey building at about 7:00pm. That the police officers queried him if he knew the building and he denied. That he was blindfolded again and taken into the building, and when his eyes were opened he noticed that he was inside a house with the 1st appellant and other police officers. That he was asked whether he knew the 1st appellant but denied knowing him.

36. That he and the 1st appellant were blindfolded and taken to the ground floor and later bundled into a vehicle and taken to place where they were interrogated for three (3) days.

37. The 2nd appellant denied that he was found sleeping in the 1st appellant's house and that he ever lived there. He further denied that grenades recovered were his and stated that he first saw them at the ATPU offices. He also reiterated that he doesn't know the 1st appellant and that he saw him for the first time when he was arrested and taken to his house.

38. The 1st appellant testified as a defence witness for the 2nd appellant. He conceded that he lived in and paid rent for the house in which he was arrested. That he lived in the house with four (4) other people whose names he gave to the police officers. He further, conceded that the weapons were recovered from the kitchen in his house but denied knowledge who brought them into the house.

39. The 1st appellant also denied that at the time of his arrest there were other people in the house stating that he was alone. That doesn't know the 2nd appellant and did not live with him. That the 2nd appellant was brought to his house by police officers on the day of arrest while blindfolded with a polythene paper and asked whether he knew him which he denied. The 1st appellant further denied signing the inventory.

40. The 3rd appellant gave sworn testimony and denied all the charges against him. He denied all the aliases names indicated in the charge sheet as being his names and stated that his name is Musharaff Abdallah Shikanda and that he has only two nicknames being; Ali and Alex.

41. However, 3rd appellant admitted that he was in Nairobi on 14th September 2012 as he had a cereal business with one Fred and had visited Fred's home in Langata. That at 8:00pm in the company of Fred and his girlfriend, they went to a club named Florida and at 3:00pm he went to his house at Eastleigh 2nd Avenue. That the following day of 15th September 2012, he visited (PW16) Eunice Ngendo to assist him to recover his deposit for the 1st room he rented out before moving to a much cheaper room.

42. The 3rd appellant testified that he left Nairobi for Malindi on 29th November 2012 and while at Wananchi Bar police officers knocked on the door to the room he had booked and asked for Ali Bonnie who had paid for the room but he informed them that he was not the one and that Bonnie was his friend who had come with him to the hotel. That the police officers asked him for his identity card but he informed them that he did not have one.

43. That he explained that he went to Malindi to collect his belonging from a house he used to live in at Sabasaba, but the police officers arrested him and took him to the police station. That while at the police station they called a man and they went to his house at Sabasaba where they searched the house, took his property before returning him to the police station and placing him in the cells.

44. The 3rd appellant stated that he was arraigned in court the following Monday charged with the offence of handling stolen property and being in Kenya illegally and that the officers sought for an order to detain him for three (3) days in order to conclude their investigations and after the three (3) days he was transferred to ATPU office in Nairobi.

45. The 3rd appellant denied that he was in Kenya illegally and stated that he could not apply for an identity card as he did not have his parents' documents. That his father had divorced his mother and had married many wives. That he used to be mistreated by his step-mother and in the year 2007 relocated to Watamu for studies and later work. He denied that he told several people that he was traveling to France or Canada as he did not have an identity card or a passport.

46. He further denied knowing the 1st appellant and/or visiting him frequently stating that he saw him for the 1st appellant when he was arraigned in court. Further he denied paying rent for the 1st appellant's house. Furthermore (PW33) Sgt Fedha, the Investigating Officer, never led any evidence to show his connection to the 1st appellant.

47. The 3rd appellant challenged the evidence of the identification parade and stated that the parade had only five (5) people and not eight (8) people as alleged. Further, the members of the parade had different complexions and only two (2) people were tall being him and another person of Somali origin. That when (PW1) Josphat was asked to identify a person on the parade, he picked him stating that he was tall. He denied signing the parade form.

48. He also challenged the evidence by (PW31) Victor Ouma Odera and (PW32) John Ogola Achcha who were mechanics stating that, they did not know him and they were never called for an identification parade. Further, they called him blackie because they did not know his name and that because he is black.

49. The 1st appellant also testified as a witness for the 3rd appellant and denied knowing the 3rd appellant or that he had visited him in his house. He stated that he first met the 3rd appellant in court when the two cases were consolidated. He further denied that the 3rd appellant used to help him pay rent for his house and that he worked as a broker and had his own money to pay for rent.

50. At the conclusion of the case, the trial court in its judgment delivered on 1st August 2017 acquitted the 1st and 2nd appellant on count 11. The 2nd and 3rd appellants were found guilty on all the other charges, convicted and sentenced as follows: -

    a. The 1st accused was discharge under Section 35(1) of the Penal Code on the 12th and 13th counts on the ground that the period spent in custody was sufficient. Likewise, the 2nd accused was discharged under Section 35(1) of the Penal Code on the 10th count on the same grounds that, the time he has spent in custody was sufficient to cover the punishment to be meted out. However, the court ordered that, he should seek registration immediately upon release from custody.

    b. The 2nd and 3rd appellants were sentenced to serve five (5) years imprisonment and the sentence ordered to run concurrently.

    c. The 2nd and 3rd appellant were sentenced to serve seven (7) years imprisonment on the 3rd count of being in possession of ammunition without a firearm conflicts. The sentence was ordered to run consecutive to the first two sentences.

    d. The 2nd and 3rd appellant were sentenced to serve ten (10) years imprisonment on each count in the 4th and 8th counts and the sentences ordered to run concurrently but consecutive to the other sentences.

    The 2nd and 3rd appellants were sentenced to serve total of twenty-two (22) years imprisonment.

51. However, all the appellants being aggrieved by the trial courts' decision filed separate appeals. The 1st appellant filed an appeal vide High Court Appeal No. 117 of 2014 through the firm of Abdullahi and Associates against sentence only on the following amended grounds as verbatim reproduced:

    a. The learned Hon. Magistrate erred in both law and fact by sentencing the appellant in blatant breach of his constitutional rights, safeguards and protections.

    b. The learned Hon. Magistrate erred in both law and fact by meting out a consecutive sentence for each count instead of a concurrent one in the circumstances.

    c. The learned Hon. Magistrate erred in both law and fact by meting an excessive sentence of 7 years on Count I, 5 years on Count II, 5 years on Count III, 7 years on Count IV, 7 years on Count V, 7 years on Count VI, 7 years on Count VII, 7 years on Count VIII, 7 years on Count IX; and an additional period of 7 years, in default 1 year imprisonment.

    d. The learned Hon. Magistrate erred in both law and fact by taking into account irrelevant and extraneous considerations that did not form part of the evidence tendered, therefore reaching a wrong conclusion in law hence the entire decision amounts to miscarriage of justice.

    e. The learned Hon. Magistrate erred in both law and misdirected herself when she refused to allow the accused to give mitigation in the circumstances.

    f. The learned Hon. Magistrate erred in both law and principle in replacing judicial mind with emotions and personal idiosyncrasies thereby failing to exercise her judicial duty with impartiality, disinterest, dispassion and objectivity.

52. It is sufficient to note that, on 22nd May, 2019, the 1st appellant filed in person other grounds of appeal without leave of court entitled "amended/supplementary grounds of appeal" verbatimly reproduced here under: -

a. That, the learned trial Magistrate erred in points of law and fact by failing to follow the provision and guidelines given by the law on unequivocal plea of guilty.

b. That, the learned trial Magistrate erred in points of law and fact by failing to follow the Penal Code provisions, *the Constitution* of Kenya, the Sentencing guidelines and the new criminal procedure guidelines in relation to sentence of concurrent/consecutive.

c. That, this Honourable Court in this appeal need to find that the rule of thumb of criminal trial of fair trial were violated by the trial court and the DPP for failure to provide me with correct court records to facilitate this appeal coupled with late provision of contradicting, incomplete record.

d. That, the learned trial Magistrate erred in points of law and fact by failing to find that fundamental rights to a fair trial were violated for non issuance of court records.

e. That, the learned trial Magistrate erred in points of law and fact by failing to the tenets of fair administrative action as regards sentencing of the accused person thereby occasioning prejudice.

53. The 2nd appellant on his part appealed against both conviction and sentence vide High Court Appeal No. 105 of 2017, on the grounds as here below verbatim reproduced: -

a. That the learned trial magistrate erred in fact and convicting the appellant on incurably defective charges that did not accord with the provisions of the law under which the charges were framed and therefore did not afford the appellant a fair notice or warning of the charges.

b. That the learned trial magistrate erred in law and in fact in convicting the appellant when the ingredients of the offences charged were missing, inadequate and/or not proved.

c. That the learned trial magistrate erred in law and in fact in convicting the appellant without any or adequate evidence of identification.

d. That the learned trial magistrate erred in law in convicting the appellant by applying the legal definition of possession in the Fire Arms Act, retroactively.

e. That the learned trial magistrate erred in law and in fact in convicting the appellant against the weight of evidence.

f. That the learned trial magistrate erred in fact and in law in convicting the appellant when the offences charged were not proved to the required standard.

g. That the learned trial magistrate erred in fact and in law in convicting the appellant on the basis of mere suspicion and/or circumstantial evidence that did not in all the circumstances of the case meet the required legal standard.

h. That the learned trial magistrate erred in law and in fact in convicting the appellant on the basis of assumptions, presumptuous matters, unsettled facts and conclusions un-established by evidence.

i. That the learned trial magistrate erred in law and in fact in convicting the appellant by watering down and/or shifting the burden of proof.

j. That the learned trial magistrate erred in law and in fact by failing to give the appellant's defence particularly his defence of alibi a fair, objective and open-minded analysis and casually rejected the appellant's defence.

k. That the learned trial magistrate erred in law and fact in convicting the appellant when material witnesses were not called by the prosecution and material evidence exonerating evidence deliberately withheld from the Court by the prosecution.

l. That the learned trial magistrate erred in law and in fact in meting out sentences against the appellant that are illegal, harsh and excessive in the circumstances.

54. The 3rd appellants ground are similar to those of the 2nd appellant.

55. Be that as it were, when the matter came up for directions on 8th December, 2021 the court ordered that the appeals be consolidated with HCCRA 117 of 2014 being the lead file.

56. Subsequently, the 2nd and 3rd respondent with the leave of court filed an amended petition of appeal on the grounds that: -

a. The Learned trial Magistrate erred in law and fact in convicting and sentencing the appellants in counts (I) up to (VIII) on basis of assumption and without any reasoning at all.

b. The conviction was unwarranted and the sentence illegal under the circumstances as the same were not based on any evidence to connect the appellants to the offence they were charged of as the charges were not proved hence the Learned Trial Magistrate misdirected himself on the conviction and sentence thereof.

c. The sentence meted against the appellants was harsh and excessive in the circumstances.

d. The Learned trial Magistrate misdirected himself in ordering that the sentences to run consecutively when the offences the appellants were charged with were committed in one single transaction.

e. The trial Magistrate erred in law and fact in sentencing the 1st appellant and 2nd appellants in Counts (XII), (XIII) and (X) respectively to the term served in custody pending trial without considering that the appellant had been in custody for 4 years and 8 months yet the maximum penalties in the offences they were charged with is only one year imprisonment.

f. The trial Magistrate erred in law and fact in finding that the Prosecution had proved its case beyond reasonable doubt.

g. The learned trial Magistrate erred in law and fact in convicting the 1st appellant in counts (XII) and (XIII) in absence of proper identification of the appellant by Prosecution witnesses.

h. The learned trial Magistrate erred in law and fact in convicting the 2nd appellant in count (X) disregarding that fact that the element of mens rea fact not been proved since the appellant was willing and ready to register but lacked the requisite documents for the registration.

i. The trial Magistrate erred in law and fact in failing to consider/rejecting the defense of alibi by the 1st appellant.

j. The Learned trial Magistrate erred in law and fact in failing to find that 1st appellant had been sneaked in the house the scene of crime by the Police.

k. The learned Magistrate erred in law and fact in failing to find that the circumstances were not favorable for the watchman (PW1) to notice that 1st appellate was being sneaked in the house.

l. The learned trial Magistrate misdirected himself by rejecting the defense of 1st appellant on basis of contradictions on the time of his arrest yet the contradiction was minor, superficial and reconcilable.

m. The learned Magistrate erred in law and fact by rejecting the defense the 2nd appellant.

n. The learned Magistrate erred in law and fact by failing to observe the irreconcilable contradictions in the prosecution case.

o. The learned Magistrate erred in law and fact by failing to find that the identification of the 2nd appellant by the prosecution witnesses was defective.

p. The learned Magistrate erred in law and fact by relying on circumstantial evidence to infer constructive possession against 2nd appellant without proper corroboration.

q. The learned Magistrate erred in law and fact in admitting and relying on testimony of incredible witnesses.

r. The learned trial Magistrate misdirected himself in making inference of constructive possession of the firearms against both appellants with prove of knowledge of the existence of the firearms against the appellants.

s. The conviction and sentence are a miscarriage of justice hence the same should be quashed and set aside.

57. The appeal was disposed of vide filing of submissions which are considered herein. The 1st appellant in submissions dated; 30th March 2022, submitted that he was unrepresented and was never informed of his right to legal representation despite facing serious charges.

58. Further, at the reading of the particulars of offences there was no expert reports accompanying the explosives, ammunition and firearms to confirm the same in contrast to the trial against the 3rd appellants who went through full trial.

59. The 1st appellant submitted that there is need for standardization of the sentences as he was sentenced to serve a cumulative sentence of fifty-nine (59) years despite pleading guilty and saving precious judicial time yet the 3rd appellant was sentenced to serve on twenty-two (22) years.

60. That in addition, the trial court failed to pronounce itself on whether the sentences were to run concurrently or consecutively. The appellants argued that, the recovery having been made in a single transaction, from the same house at the same time and preserved in the same boxes, the all sentences ought to have been ordered to run concurrently in line with the decision of the Court of Appeal in the case of; Peter Mbugua Kabui vs Republic [2016] eKLR.

61. The 2nd appellant in submissions dated 17th June 2022 argued that, in order for a conviction to have been founded on the offences he was charged with, there was need for thorough and unequivocal identification through; firstly, a properly conducted identification parade and/or secondly, direct identification by a witness in open court while presenting his/her testimony who gave a description to support the reason for identification. That there was no identification of the 2nd appellant in either of the two ways by the prosecution.

62. The 2nd appellant further submitted that only three witnesses being PW26, PW29 and PW30 gave evidence in regards to counts 12 and 13, however none of them gave a description of and/or attended an identification and/or was asked to positively identify the said SAA in court and whether was indeed 2nd appellant.

63. Further, (PW30) Rose Anyango Bola gave evidence that she gave the said SAA a form to fill after which his photograph and fingerprints were taken. Nevertheless, the investigating officer and/or the prosecution failed to produce the photograph to confirm that indeed it was that of the 2nd appellant. Similarly, there was failure to produce the finger print examination report to demonstrate that the fingerprint taken for SAA actually belong to the 2nd appellant. Additionally, neither the charged police abstract nor the acknowledgment slips were found in his possession

64. The 2nd appellant further submitted that, he gave satisfactory rebuttals in his sworn defence stating that he has never used the name SAA, and that he has never been to Pangani Police Station where (PW29) No. 76xxx PC Alfred Mbaua was stationed nor met (PW30) Rose. Furthermore, he was a minor at the time of his arrest and had never applied for an identification card which was corroborated by the evidence of (PW26) Oscar Crispus Opiyo that there was no record of the names of the 2nd appellant in the database of the Registrar of Persons.

65. The 2nd appellant submitted with regard to the charges in count (1) to (8), that he was arrested at Hass Petrol Station and escorted to the house where recovery was done while (PW12) SP Langat was verifying the explosives. In the circumstances PW7, PW12 and PW13 were not first-hand witnesses to his arrest. That in the circumstances the only witnesses who could give evidence of whether he was arrested in the house was either the police officers who made the recoveries and the five uniformed officers who escorted him to the house.

66. The 2nd appellant argued that, evidence adduced in support of counts (1) to (8) failed the identification tests for reasons that, the prosecution witnesses completely failed to identify him. That, PW2 stated that he did not know him and had not seen him in the plot before.

67. Further, his identification was an afterthought as witnesses referred to him in generalised terms such as; the others, the other one and/or his companion. Further (PW3) PC Ndiwa in his written statement made on 14th September 2012 never mentioned him and it was only in his oral testimony that the witness alleged that he found him in the house.

68. Furthermore, the presence of the 2nd appellant was conspicuously missing from the evidence as the testimony of (PW5) PC Kyule was to the effect that after the discovery of the grenade, the other police officers rushed out while he was left with Abdimajid creating a clear logic that the he was not at the house as at that time. That the same witness testified that he interacted with him for the very first time outside the house.

69. The 2nd appellant faulted the trial court for not considering the defence and concluding that police officers could not pick him from the street and take him to the house where the items were found for no reasons.

70. Further that although the trial court held that he incorrectly stated the time he got to the house, and that he could tell the time despite being blindfolded, he submitted that his inability to comprehend the time was greatly affected by the fact that he was blindfolded and driven around for a long time in a small vehicle.

71. Furthermore, all the evidence linking him to the house was based on information obtained from the 1st appellant in his statement erroneously referred to as a confession which in any event amounts to hearsay. But then the 1st appellant gave the names of his housemates and stated that he did not know him and that he was not staying with him

72. That the prosecution allegations that he purchased the red vehicle for purposes of carrying the explosive, was not supported as the prosecution failed to produce the subject vehicle and/or its logbook thereof.

73. That the evidence of PW15 Dennis Karanja Njiiri who sold the subject vehicle was full of glaring hole, due to his inability to identify him as the witness stated that he interacted with two men of Somali origin whose names he didn't know and that it was dark and spent only a few minutes with them. Further he saw the suspect in the media after they were charged and before he recorded his statement. Furthermore, though he claimed that he did not understand English or Kiswahili, (PW33) SP Fedha acknowledged that he could speak both English and Kiswahili and he gave his defence in Kiswahili.

74. That whereas (PW31) Victor Ouma Odera and (PW32) John Ogola Achacha the mechanics who repaired the subject vehicle on 13th September 2012 at 11:00am and 5:00pm were able to describe the 1st and 3rd appellant, they did not identify him. Furthermore, whereas (PW23) No. 68xxx Acting Inspector Francis Muthee Gichuhi testified that the vehicle was abandoned on 20th September 2012 and the story in the Nation and Star Newspapers stated that the Anti-Terrorism Police Unit records indicated that the vehicle was abandoned on 14th September 2012, exposing an attempted cover up by the police to place him at the house.

75. The 2nd appellant further submitted that no evidence was led to show that he had knowledge of the existence of the charge items in the house. Further, it was not proved that he had control or free and unhindered access of the premises or that he handled the items before his arrest.

76. Further, both (PW1) Josephat Waweru Gakinya and (PW2) Francis Kariuki Kimani testified that they had never seen him in the subject house and that the bags were recovered from the kitchen while it is alleged that he was sleeping in the sitting room.

77. Finally, that the prosecution failed to establish all the key ingredients of constructive possession as enunciated in the case of Stephen vs R (1973) E.A 22 and John Maina Kamunya vs Republic [2009] eKLR where it was held constructive possession can only be applied where it is shown that an accused knew of the items that are the basis of the charge.

78. The 3rd appellant vide submissions dated; 30th March, 2022 argued that the prosecution failed to prove that he was in actual possession and/or constructive possession of the explosives, ammunitions and firearms as charged with in counts (1) to (8).

79. That the trial court erred by failing to look for an alternative legal definition of the word possession and instead strictly applied the definition of possession under section 4 of the Penal Code, which is restricted to offences under the Penal Code as held in the case of Stephen vs R (1973) EA 22 and Abdi Osman Ahmed vs R (2007) eKLR.

80. He relied on the definition of possession in the Black Law Dictionary as the right to exercise control over something to the exclusion of others and argued that it could not be said he was in possession of exhibits that were found in a place where he did not have control of, and that it was therefore unrealistic that he exercised control over the exhibits to the exclusion of all others. Further, the trial court in his judgment concede that he could not have been in actual possession of the items.

81. That, the trial court's conclusion that he had knowledge of the exhibits and therefore in constructive possession was based on unsubstantiated and uncorroborated claims by (PW1) Josephat Waweru Gakinya and (PW32) John Ogola Achacha that he frequently visited or was seen going into the house where the items were recovered. Further, (PW1) Gakinya never saw any suspicious bags/luggage enter

the house, while (PW32) Achacha never identified the bags in court and could not tell the specific house he visited.

82. That constructive possession was never proved as there was no nexus created linking him to the exhibits recovered in the house. That despite the exhibits being taken for DNA profiling, there was no match with the buccal swab taken from him.

83. Further, he was not the owner, tenant and/or resident of the house where the exhibits were recovered but only a visitor and that the evidence of the prosecution was based on mere speculation and suspicions but did not irresistibly point to him having special knowledge of the exhibits.

84. The 3rd appellant relied on the case of; Omar Said Omar alias Mohamed Ali Mohamed vs Republic (1987) eKLR where it was stated that it was wrong to apply the doctrine of constructive possession where no evidence squarely linked the appellant to special ownership and/or tenancy of the flat that was the locus in quo.

85. That the evidence of identification was not sufficient to link him directly or indirectly to the knowledge and control of the exhibits. That, (PW1) Gakinya did not produce any documents to prove that he was an employee of Alpha Security Company, as a security guard and that he was on duty between 6:00pm and 6:00am on the fateful day guarding plot G gate, where the exhibits were recovered. Further (PW3) PC Ndiwa in cross-examination stated that he did not see the watchman.

86. Further, the evidence of identification by (PW32) Achocha was stage managed by the police and was full of glaring inconsistencies and self-contradictions as he testified in cross-examination that the people he interacted with were black, stout and short, but when he was asked to stand up, the witness conceded that he was actually taller than the witness and claimed that mobile phone photos he was shown of the suspects were not clear.

87. That (PW32) Achocha never participated in an identification parade and in the circumstances, his identification amounted to dock identification which is unreliable. He relied on the cases of; Gabriel Kamau Njoroge vs R (1982-88) and James Tinega Omwenga vs R CRA No. 143 of 2011 where it was held that a court should not place reliance on dock identification which is worthless unless the witness gave a description of the suspect to the police who should arrange an identification parade for the witness to point out the suspect.

88. The 3rd appellant further argued that the identification by (PW9) Abdalla Musa Washindi, (PW10) Dennis Muethia Mirithi, (PW11) No. 23xxx CIP Kinoti Kithinji and (PW19) Fednard Mwaugena related to different locations and therefore did not add any value to the prosecution's case with regard to possession of the exhibits.

89. Further, the prosecution's case was marred with contradictions as (PW1) Gikanyi stated in his evidence in chief that about ten (10) police officers went to the gate, however, in cross-examination he stated that he did not know the number of the police officers. Further, the witness stated that he was the fifth or sixth person from the left during the identification parade, however in cross-examination he claimed he could not remember the position.

90. Furthermore, (PW9) Washindi testified that he spoke to his mother on telephone but denied it in cross-examination while, (PW11) CIP Kinoti stated that he prepared the inventory of his items however in cross-examination stated that Corporal Juma and PC Kimani prepared the inventory. Lastly, (PW33) SP Fedha the investigating officer admitted in cross-examination that when they normally arrest suspects they take photographs.

91. The 3rd appellant thus submitted that the inconsistencies were of glaring nature so as to create doubt as to his guilt. He cited the case of; John Nyaga Njuki & 4 Others vs R (2002) eKLR where it was stated that if the discrepancies are of such a nature that it would create doubt as to the guilt of the accused, the prosecution will have failed to discharge its burden to prove the case beyond reasonable doubt but where the discrepancies do not affect the proven case the court is entitled to overlook such discrepancies and convict the accused.

92. That the trial court overlooked his defence that the identification parade was not conducted in line with the Force Standing Orders 6(iv) as there were only five people in the parade and only him and one other person were tall and of Somali origin.

93. Lastly, the 3rd appellant submitted that the sentences meted out were harsh and excessive in the circumstances of the case. That, section 333(2) of the Criminal Procedure Code was never complied with as he was sentenced to five (5) years imprisonment on count (1) and (2), which offence attracts a maximum sentence of seven (7) years, despite the fact that he was in pre-trial custody for five (5) years.

94. He cited on the case of; Ahamad Abolfathi Mohammed & another vs Republic [2018] eKLR where the Court of Appeal stated a court is obliged to take into account the period an accused has been in custody so that the sentence imposed is reduced proportionately by that period.

95. The trial court is further faulted for sentencing him on count (3) on its own while clustering count (4) to (8) together despite the fact all related to possession of firearms. That, the charges should have been in two clusters being count (1) and (2) under the *explosives Act* and count (3) to (8) under the *Firearms Act*.

96. The appellants argued that, the recovery having been made in a single transaction, from the same house at the same time and preserved in the same boxes, the all sentences ought to have been ordered to run concurrently in line with the decision of the Court of Appeal in the case of; Peter Mbugua Kabui vs Republic (supra).

97. Further, counts (3) to (8) were defective as they were hinged on section 4(2)(a) as read with section 3(a) of the *Firearms Act* but ought to have been read with section 4(3)(a) of the Act, which defect could not be cured.

98. Furthermore, the trial court failed to consider that count (9) was withdrawn after the close of prosecution case thus he was never linked to the to any terrorism outfits or organized gangs, which was an aggravating factor and therefore should have had a favourable impact on sentencing.

99. However, the respondent vide submissions dated 15th April, 2022 relied on the definition of possession in Black's Law Dictionary 10th Edition, which stated that it is, inter alia, the fact of having or holding property in one's power and the exercise of domain over property.

100. The respondent submitted that in the case Tima Kopi v Republic (2005) eKLR the High Court quoted the case of Salim v R (1980) KLR 139 where Court of Appeal adopted the definition of the word possession from Stephen's Digest of Criminal Law, 9th Ed at page 304 and interpreted it in a manner not to mean legal title or having access to the exclusion of other but rather that the possessor must have such access to and physical control over the thing that he can deal with it as the owner could to the exclusion of strangers.

101. That from the evidence on record the appellants were active participant in the commission of the offence and were charged and rightly convicted as per section 20 of the Penal Code. Further, the

doctrine of common intent as set out in section 21 of the Penal Code is crucial in determining culpability.

102. That PW2 Francis the caretaker of Plot No. 36/1/1014 on 18th August 2012, entered into a tenancy agreement for a single bedroom with a tenant who identified himself as Ali Hussein of cell-phone No. 07xxx and who he was able to identify at the CID Headquarters.

103. Further, PW1 Gakinya who worked as a security guard stated that Ali was the tenant of house number 4, staying with two or three people and frequently visited by Shikanda. That, (PW1) Gakinya participated in an identification parade and was able to identify the 3rd appellant the Shikanda.

104. Similarly (PW16) Sylvia Gituara, a real estate agent, testified that the 3rd appellant who she knew as Shikanda visited their offices seeking a house to rent and was allocated a house in Eastleigh 2nd avenue.

105. Furthermore, (PW3) PC Ndiwa one of the first police officers to arrive at the house that the appellants were residing in testified that the 1st appellant was the one who opened the door while the 2nd appellant as asleep.

106. That, (PW15) Dennis Karanja Njiiri who sold the subject vehicle testified that it was the 1st and 2nd appellants who bought the vehicle for Kshs. 150,000 which vehicle was discovered by (PW23) No. 68xxx acting Inspector Francis Muthee Gichuhi abandoned. In addition, (PW31) Victor identified the 2nd and 3rd appellant as the persons who took the vehicle for repairs while (PW32) Achacha identified the 1st and 3rd appellants as the people ferrying bags to the subject vehicle.

107. That the prosecution relied on direct evidence to prove the participation of the appellants in the crime and placed them at the scene and therefore their alibi defence was an afterthought meant to hoodwink the court.

108. That as regard count 10, the 3rd appellant failed to register as a Kenyan citizen despite the fact that he was twenty (26) years old and his parents lived in Busia.

109. The prosecution submitted on count 12 and 13 that the 2nd appellant presented himself as Salman Abdi Aden and falsely informed PW29 PC Mbaua a police officer at Pangani Police Station that he had lost his national identification card No. 30xxx and was issued with an abstract.

110. Furthermore, the 2nd appellant went to the Registrar of Person, Pumwani Registration Office with the police abstract seeking to get a duplicate national I.D. and duly filled the requisite forms after which his fingerprints and a photograph were taken and was subsequently issued with a waiting card.

111. On the issue of contradictions, the respondent argued that there were no contradictions nor inconsistencies and even if they were there, they were minor and do not go to the root of the prosecution case and were satisfactorily explained.

112. Finally, the respondent submitted that the sentences were proper in the circumstances of the case and that the trial Magistrate took into consideration the period spent in remand, which is not a mathematical exercise. The respondent quoted the case of Mohamed Salim vs Republic (2020) eKLR where the High Court stated that it is sufficient for the court to note on record that it had taken account of the incarceration during the pendency of the trial and that taking into account is not an arithmetic or mathematical exercise.

113. At the conclusion of the arguments and/or submissions on appeal, the court notes that the role of the first appellate court is to re-evaluate the evidence adduced in the trial court afresh and arrive at its own conclusion taking into account that the court did not have the benefit of the demeanour of the witness.

114. In that regard, the court stated in the case of Okeno vs. Republic (1972) EA 32 that;

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

115. Pursuant to the aforesaid, I have evaluated the evidence adduced in total and the arguments on appeal. The appellants have raised several issues but the first issue for consideration in particular as regard count (1) to (8) is whether the prosecution proved the ingredients of the offences therein.

116. In that regard, the main ingredient in all those counts is the term "possession". Thus the main issue is whether the trial court properly addressed itself to the definition and/or meaning of that term "possession".

117. The trial court dealt with this issue at page 51 of the judgment. It relied on section 4 of the Penal Code (Cap 63) Laws of Kenya and the case of Francis Mbugua M. Vingera –vs- Republic (2014) eKLR and held that by mere presence in the house where the items in question were found, the 2nd appellant was in possession of the said items.

118. The analysis relating to the 3rd appellant was laid at page 52 to 53 of the judgment. In a nutshell the trial court held that the 3rd appellant frequented the house where the items were recovered, and had left the house the night of recovery. Further that he was seen by (PW32) Achacha carrying bags in and out of the house where the items were recovered from. Furthermore, he was residing in the neighbourhood and left thereafter after the 1st and 3rd accused were arrested. The trial then court inferred that, he was on the run.

119. The trial court then stated that the circumstances under which he was arrested away from his residence in a hotel room indicates he was on the run. The trial court also stated that, his use of several names which leads to the conclusion that, he was running away from the police officers. That he did not explain why he abandoned his residence to a hotel and changed residence within a short span. The trial court stated that, it agreed with the investigating officer that the rented premises were storage facility for the offence and/or illegal items herein.

120. The trial court then stated that possession by dint of section 4 of the Penal Code is both actual and constructive. That the prosecution was duty bound to prove that the "2nd accused knew of the presence of the items in the house in which they were found". That based on the reasons afore the trial court stated that it was satisfied that, the 2nd accused had knowledge and control of the items recovered from the house. The court further stated that, the three accused knew each other and were in concert to execute a common intention, being in possession of the explosives, firearms and ammunition. In conclusion, the trial court dismissed the defence(s) of 1st and 2nd accuseds on being in possession of the subject items and convicted them accordingly

121. Be that as it, it suffices to note that, the burden of proof, in criminal cases is beyond reasonable doubt and in that regard the accused person cannot be called upon to prove the case, unless the burden is shifted.

122. The key issue is; what constitutes possession. Section 2 of the *Firearms Act* defines possession as: -

a. 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 of benefit of oneself or of any other person and the expressions "be in possession" or "have in possession" shall be construed accordingly; and

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 and possession of each and all of them".

123. Similarly, section 4 of the Penal Code defines possession as:

a. "Be in possession of" 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 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 and possession of each and all of them;"

124. In addition, Black Law's Dictionary, 9th Edition defines possession as:

> " The fact of having or holding property in one's power; the exercise of dominion over property. 2. The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object".

125. In discussing the concept of possession, the court in the case of; Nicholas Kipngetich & 2 others v Republic [2021] KEHC 447 (KLR) outlined the elements thereof as follows: -

a. The physical control of the item of the offence

b. Knowledge or intention of having, the article instruments, thing or items constituting the offence

126. Pursuant to the aforesaid, the key word is "knowledge". In the case of Peter Mwangi Kariuki -Vs- Republic (2015) eKLR the court stated that:

> " To be guilty of possession, an accused person must be shown to have knowledge of two things, namely, that the accused knew the item was in his custody and secondly he knew that the item in question was prohibited. A person has possession of something if the person knows of its presence and has physical control of it, or has the power and intention to control it."

127. In Ahamed Abolfathi Mohamed –vs- Republic (2018) the Court of Appeal stated that section 4 recognizes both actual and constructive possession but emphasized there has to be evidence on record that, they knowingly had the item.

128. To revert back to the evidence herein as regard the 2nd appellant led by (PW1) Josephat and the officers who arrested him (PW3) PC Ndiwa and (PW5)PC Kyule to the effect that he was arrested in the house where the subject items were recovered. He denied having been arrested in the house where the items were recovered and testified he was outside and taken to that house. The trial court dismissed that defence.

129. In my evaluation of evidence, I concur with the trial court's finding that the police officers could not pick him from the streets and plant the charges on him. Furthermore, (PW1) Josephat stated that he saw police officers come out of the house with two (2) people; the 1st and 2nd appellants herein. That he knew the 1st appellant as the owner of the house but did not know the 2nd appellant well as he was not owner of that house. In addition, the 1st appellant testified that the 2nd appellant was not the owner of the subject house, thus basically corroborating the evidence of (PW1) Josephat and exonerating the 2nd appellant from being the owner or occupant of the subject house.

130. It is therefore clear that the 2nd appellant was not a resident or owner of the house the subject goods were recovered.

131. At this stage, the question that arises is; whether the 2nd appellant had possession and/or knowledge the existence of the recovered items. The evidence of the officers who recovered the subject illegal items is that they were recovered in the kitchen in suitcases and that the 2nd appellant was found sleeping in the sitting room.

132. From the statutory definition of possession herein, to establish actual or personal possession two elements must be proved that; there be an actual physical custody of the object and a knowledge of the nature of the object while with custody.

133. It is noteworthy that section 2 of the Penal code states that; "knowingly", used in connexion with any term denoting uttering or using, implies knowledge of the character of the thing uttered or used". Thus the term possession applies if a person is aware that his or her actions will have certain results, but does not seem to care.

134. In discussing the term "possession" the court in the case of, Beavers v The Queen, 1957 CanLII 14 (SCC), [1957] SCR 531 used the following illustration: -

> " It may be of assistance in examining the problem to use a simple illustration. Suppose X goes to the shop of Y, a druggist, and asks Y to sell him some baking-soda. Y hands him a sealed packet which he tells him contains baking-soda and charges him a few cents. X honestly believes that the packet contains baking-soda but in fact it contains heroin. X puts the package in his pocket, takes it home and later puts it in a cupboard in his bathroom. There would seem to be no doubt that X has had actual manual and physical possession of the package and that he continues to have possession of the package while it is in his cupboard. The main question raised on this appeal is whether, in the supposed circumstances, X would be guilty of the crime of having heroin in his possession?

135. The court went on explain that assuming the burden shifted to X and he responded: -

> " Of course I had possession of the package, I bought it, paid for it, carried it home and put it in my cupboard. My defence is that I thought it contained baking-soda. I had no idea it contained heroin." If it be suggested that X could not usefully make this reply if what was found in his house was not a sealed package but an article of the sort described, the answer would appear to be that many persons might not recognize an opium lamp

or an article capable of being used as part of such a lamp. The wording of s. 17 does not appear to me to compel the Court to construe s. 4 as the Court of Appeal has done. It still leaves unanswered the question: Has X possession of heroin when he has in his hand or in his pocket or in his cupboard a package which in fact contains heroin but which he honestly believes contains only baking-soda? In my opinion that question must be answered in the negative. The essence of the crime is the possession of the forbidden substance and in a criminal case there is in law no possession without knowledge of the character of the forbidden substance" (emphasis mine).

1. Similarly, O'Halloran J.A. concurred, in Rex v. Hess (No. 1), 1948 CanLII 349 (BC CA) stated that "to constitute "possession" within the meaning of the criminal law it is my judgment that where, as here, there is manual handling of a thing, it must be co-existent with knowledge of what the thing is, and both these elements must be co-existent with some act of control (outside public duty)."

2. In this matter, I wish to draw an analogy of a person who visits a house and hardly has he/she sat down, the police officers walk in and arrest him/her and upon search items are recovered from the house which turn out to be illegal and s/he is charged with being in possession thereof, would this person be said to have had knowledge of the existence of the said items, or to have had control thereof and consequently in possession? Does the mere fact that, one was arrested in a premises where a search is carried and illegal items recovered prove possession beyond reasonable doubt.

3. Finally, it suffices to note that "knowledge" as part of means rea (guilty mind) element generally means that the accused is aware of a fact or circumstances or is virtually certain that something is so

4. Pursuant to the aforesaid, it is the considered opinion of this court that, although the 2nd appellant may have been in the house where the items herein were recovered, he may not have had knowledge of their presence in that house and/or knew they were illegal and prohibited. The charges on counts 1st to 8th count were thus not proved against the 2nd appellant beyond reasonable doubt,

5. As regard the 3rd appellant, I have considered the reason advanced by the trial court of convicting him on counts (1) to (8) and I find that it is possible that, he was known to the 1st appellant and frequented his house. In addition, evidence adduced (though denied), is that him and 1st appellant was seen carrying bags in and out of the car to the house where the subject items herein were recovered.

6. However, the question is this, is there evidence that, he knew the contents of the bag. The trial court acknowledged that he was not in actual possession of the subject items but relied on the concept of constructive trust to convict him. The requirement thereof are as follows: -

    a. Knowledge of the item;

    b. Intent/consent to possess the item;

    c. Control over the location of the item.

142. It is noteworthy that an assessment of the afore elements must be done in light of the "totality of the facts."

143. In this case, the prosecution relied on the evidence (PW32) John Ogola Achacha mechanic who testified stated the on 13th September 2012, he saw the 1st and 3rd appellant carry bags that resemble the ones recovered with the subject goods; from the building to the boot of the car and then returned them into the building.

144. However, notably when the bags and contents were recovered the witness not present. From his evidence in chief (PW32) John Ogola Achacha, was not shown the subject bags to identify them. So then was the court to verify his evidence that he saw the 1st and 3rd appellant with the bags and they are the ones recovered?

145. Furthermore, the witness, stated that he did not know on which floor of the building the appellants resided and thereof could not tell where exactly the items were taken to. Even more so, he did not know the contents of the bags as they were ferried up and down the building. Further, he conceded that the photos of the 1st and 3rd appellant shown to him were not clear and did not attend any identification parade. Consequently, the evidence of this witness as adduced was least helpful to the prosecution case as much he was a crucial witness.

146. The upshot is that, although it is possible that the 3rd appellant may have frequented the house of the 1st appellant and left when the recovery was done, that he concealed his identity by use of all sorts of names and indeed may have been on run for whatever reason, but all the same the prosecution needed to prove his knowledge, either actual or constructive of the presence of the recovered items in the house and the prohibited use thereof.

147. Furthermore, the trial court did not consider the fact that, 1st appellant pleaded guilty to the charges of possession all the items recovered and testified in favour of exonerated the 2nd and 3rd appellants from blame.

148. Consequently, the conviction of the 2nd and 3rd appellants on count (1) to (8) even without considering their defence and other issues raised in the submissions cannot stand. The conviction on those counts is thus quashed.

149. As regards, the other counts, I am satisfied that, the trial court properly guided itself on arriving at the decision thereon and I decline to interfere with the conviction and sentence thereof.

150. As regards the 1st appellant, I find that, he was convicted on a plea of guilty. A perusal on how the plea was administered, I am satisfied it was unequivocal.

151. As regards sentences meted out, the law on concurrent and consecutive sentence is stipulated under section 14 of the Criminal Procedure Code (Cap 75), where by the court is empowered to impose concurrent or consecutive sentences and states as follows: -

    1. Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefore which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.

    2. In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.

3. Except in cases to which section 7(1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences—

   (a) of imprisonment which amount in the aggregate to more than fourteen years, or twice the amount of imprisonment which the court, in the exercise of its ordinary jurisdiction, is competent to impose, whichever is the less; or

   (b) of fines which amount in the aggregate to more than twice the amount which the Court is so competent to impose.

4. For the purposes of appeal, the aggregate of consecutive sentences imposed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence".

152. In Peter Mbugua Kabui v Republic [2016] eKLR the Court of Appeal stated as follows:

> " As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment."

153. Furthermore, in Mwarome Munga Janji v Republic [2021] KECA 703 (KLR) the Court of Appeal held that: -

27. With regard to sentence, the main complaint by the appellant is with regard to the order by the High Court that the sentences shall run consecutively. Section 12 of Criminal Procedure Code provides that any court may pass a lawful sentence combining any of the sentences which it is authorized by law to pass. Section 14 of that Code provides for circumstances in which the court may direct sentences to run concurrently or consecutively. The long-standing practice is that concurrent sentences are imposed where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances. See the decision of the then Court of Appeal for Eastern Africa in the case of Sawedi Mukasa s/o Abdulla Aligwaisa [1946] 13 EACA 97.

29. In effect, where two or more offences are committed in the course of a single transaction the sentencing court should consider an order for concurrent instead of consecutive sentences. As to what constitutes same transaction, in Nathan vs. Republic [1965] EA 777 this Court stated that:

"If a series of acts are so connected together by proximity of time, criminality or criminal intent, continuity of action and purpose, or by relation of cause and effect as to constitute one transaction, then the offences constituted by these series of acts are committed in the course of the same transaction."

154. In the instant matter the charges on counts (1) to (8) are all on possession. The items were recovered in the same house, same suitcase and time. This is clear the offence arose from the same transaction. In my considered opinion the sentence meted out should have run concurrently and I order the same be and are ordered to run concurrently

155. But even more, the 1st appellant pleaded guilty and was sentenced to a total of fifty-nine (59) years while the others who went through the trial were sentenced to a total of twenty-two (22) years over the same offence, and the sentences should have been reasonably the same.

156. Further, the trial court did not consider the provisions of section 333(2) of the Criminal Procedure Code while sentencing the appellants.

157. The upshot of the afore is that the 1st appellant's appeal succeeds on sentence which will run concurrently and the 2nd and 3rd appellants appeal succeeds on conviction in relation to counts (1) to (8) and on all custodial sentence to run concurrently.

158. It is ordered.

DATED, DELIVERED AND SIGNED THIS 13TH DAY OF JUNE 2025.

GRACE L. NZIOKA

JUDGE

In the presence of:

Prof Nandwa and Mr. Chacha Mwita for the 1st and 3rd appellant

Mr. Orlando for the 2nd appellant

Mr. Ondimu for the respondent

The 1st, 2nd and 3rd appellants present virtually

Ms Hannah; court assistant