Kamau v Republic (Criminal Appeal 35 of 2021) [2024] KEHC 12684 (KLR) (16 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12684 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL 35 OF 2021

DKN MAGARE, J

OCTOBER 16, 2024

BETWEEN

ZAKAYO KARIUKI KAMAU .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the Judgment of Hon. W. Kagendo, CM delivered on 30th September, 2021 in Nyeri CMCR. No. 1939 of 2019)

JUDGMENT

1. This is an appeal from the conviction and sentence meted out by the Hon. W. Kagendo, as she was then, in Nyeri CMCR 1939 of 2019 on 30/9/2021. The Appellant was sentenced to 15 years imprisonment after taking into account the two years they were in custody.
2. The Appellant filed appeal on 19/10/2021 setting out the following grounds of appeal:
    a. That the trial court erred in both law and in fact in convicting the appellant relying on circumstantial evidence that was merely conjectures and suspicions with weak chain and coexisting circumstances destroying their inference of guilt hence not proving the offence beyond reasonable doubt standard.
    b. The trial court erred in both law and in fact in relying on evidence of exhibits “Red jacket, marvin and white striped shoes” obtained in a manner that was detrimental to justice.
    c. The trial court erred in law and in fact in not appreciating the 1st Accused’s defence that overwhelmed the prosecution case.
    d. That the trial court erred in law and in fact in not making a finding that the sentence of 15 years is manifestly excessive as per the circumstances of this case.

e. That the prosecution case was marred with contradictions, discrepancies and inconsistencies.

f. That the trial court erred in law in disregarding the Appellant's alibi defence that overwhelmed the prosecution case.

Evidence and proceedings

3. The Appellant had been arrested and was to take plea on 23/10/2019. The plea was deferred to 25/10/2019. Later, a production order was issued for 31/10/2019. The state was given 3 more days until 4/11/2019. The charges were read on 4/11/2019 to the Appellant after two-week hiatus.

4. Ezekiel Warugongo Kamau testified on 13/7/2020 as PW1 that he operated a wholesale shop within Kimunyuru at his home. He knew the Appellant and Ngunjiri). He recalled that on 26/8/2019, the witness was going on with his business selling at his shop at about 7.00-7.30 pm. Robbers got into the shop, who were armed, with, a short one was armed with a gun while the second one had a Somali sword with a saw which is a sharpener. The robber armed with a gun ordered all in the shop to lie down. At that time there were 3 people in the shop. PW1, PW2 and PW3.

5. The assailant with a gun requested for 40,000/= to be sent to his number. The second one had a SIM carrier which he read out a number that was not registered. The gun wielding person requested for cash of Ksh. 60,000/=. The short one ransacked the witness for money. The salesman had 20,000/= which he had. They also picked some uncounted money.

6. It was his further evidence that suddenly, there was a loud door bang closed. The robbers got out and ran. Kamau identified the assailant who had a black jacket and a red one with stripes in the inside. The shorter man was killed by a mob. CCTV had been installed that very day in the premises. When the police came, they rewound the CCTV and watched it. He cognized one man, Ngunjiri, who was his cousin and was almost 6 feet tall. The matter was reported to the police. The Appellant was traced and arrested.

7. The state conducted a parade where each of the witnesses was expected to pick the person they saw in the shop. In the first parade he picked the short man because of height. He talked a lot and gave orders. He also recognized the voice when he shouted back. Ngunjiri was identified in the second parade. The witness stated that he identified Ngunjiri. In their family there were 5-6 People named Ngunjiri. He identified the Co- accused by his gait, height and physique. He also identified the two suspects' shoes, the inner marvin. He was also told about Ngunjiri by another Ngunjiri, PW4. Kamau stated that the person with a sword threatened them. He was shown 14 exhibits which he identified.

8. On cross examination he identified photographs which were later produced as exhibits 1 and 1A1. He stated that he did not count how many short people were on the parade. He stated that he saw the assailants for 30 seconds. They stated that the weapons scared them. He stated that he identified the shoes. He stated that he also picked the second man from the parade.

9. On re-examination he stated that the suspects were arrested a month later. He stated he saw Appellant as he talked to him. It was his evidence that the robbery took one hour and he recognized the assailants.

10. PW2 Grace Wanja Warugongo was PW1's wife. She stated that she knew the Appellant and Ngunjiri. She stated that the duo came armed with a gun and knife and forced people to lie down. They gave them money. An employee also gave them money. The crowd who came to their rescue chased the robbers. One was caught and killed. They recognized Ngunjiri as the robber. It was her evidence that she saw the robbers as there was electric lights.

11. The robbers were wearing second jackets and a marvin. The robbers ordered all to lie down and PW1 and 2 were ordered to give money. Appellant hit PW2 on the shoulder and she was given a number to send money. The witness was forced to deposit money and send to another line, which was later traced to the deceased robber. They reviewed CCTV footage of the robbery and could recognize Ngunjiri. Another Simon came and ambushed the robbers, and opened the gate for the others. The witness was involved in an identification parade. She was shown 14 exhibits which she identified. It was stated that Ksh. 60,000/= was stolen from PW1 and 20,000/= from a worker. The one who died had masks.

12. On cross examination she stated that she signed her statement on what she saw. Two robbers entered. The Appellant's eyes could be seen and they were exposed. No other part was seen. The witness stated that she was lying down. She stated that the parade she participated in had 11 people. The 2 suspects were in that line. She picked the two suspects. She stated she knew both Appellant and Ngunjiri. She recognized Appellant through his eyes which were reddish together with his voice. She did not see Ngunjiri but saw him in the CCTV footage. She stated that she suspected that it was Simon due to height. She stated that the colour in CCTV and the picture were marred. She did not know where the exhibits were recovered from. However, Appellant hit her on the shoulder. She stated she saw the shoes Appellant was wearing. The shoes were said to be white.

13. In re-examination she stated she recognized exhibits, as the one Appellant was wearing. The bag that was recovered was the same one Appellant was carrying. She could identify Ngunjiri's walking style.

14. PW3 Samuel Murithi Gakunga was a Salesman for PW1 and PW2 but now a farmer. He knew Appellant and Ngunjiri. The witness went into the shop at 7 pm, after delivering goods. He was asked by PW1 to place money on the table for counting. 2 men entered the shop, which was still open and ordered people to lie down – 3 people were there and did so.

15. Appellant had a bullet, which he showed the witness and threatened him that he could use it on her if he stood up again. Appellant went for money from PW1, who was pleading for their lives. PW1 offered the robbers money. Appellant went back to PW3 for money. The witness had money on the table and Ksh. 200/= in his pocket. Appellant got PW2 to stand up and demanded money. PW2 sent money to a certain number. There was commotion outside and Ngunjiri asked the other robber to get out. At that time PW3 knew that there were other robbers outside. One of the robbers was arrested and killed. The people recovered a gun from the deceased robber.

16. PW3 stated that he could hear Appellant demanding money from PW1 and PW2. On cross examination he stated that he recorded his statement on 29/8/2019. He stated that two men were inside – that is the one who died and the Appellant. The one who died had a knife while Appellant had a gun. It was his evidence that the one who had a black jacket and a black marvin. The witness was shown the statement and it tallied with the colour of the marvin and white shoes.

17. He maintained that it is Appellant who ordered him to give money. Appellant instructed the short robber, who subsequently died to stab PW3 if he did not produce money. He stated that he participated in a parade, which had about 5 people with the two suspects. The witness identified Appellant. The witness did not pick Ngunjiri from the parade. He stated that he did not see Ngunjiri's face though he was sure it was him.

18. On re-examination he stated that he told the policemen about the red jacket Appellant was wearing. He also heard Appellant's voice. He stated that he saw Appellant during the robbery and at the parent. He stated that the shoes in court were not the ones Appellant was wearing during the incident.

19. PW4 Simon Ngunjiri Wambui stated that he knew Ngunjiri. On 26/8/2019 he was at home. He received a call and told there was robbery at PW1's place. The call was from another cousin David

Mwangi. The witness took a panga and arrived at the scene. He peeped and saw a man standing holding a bag. He confronted the man who dropped the panga and stick and called the accomplices inside. He came to know of people inside. A person came holding a gun. The witness retreated and hid. Subsequently, the people who had gathered gave chase and killed one of the robbers. Two of the robbers escaped but were later arrested.

20. The police came and took the body and the witness recorded his statement. He stated that he overpowered the robber who was carrying a stick and a black jacket. He saw shoes (PMFI.10) which the man outside was wearing. This has been a consistent identification for 3 witnesses for Ngunjiri. The bag that was left behind had a red cap and Prison beret.

21. On cross-examination he stated that he authenticated his statement. The witness stated that he only identified Ngunjiri from CCTV. He stated that at the time of struggle, he did not realize it was a person he knew. He stated that he recognized the posture and walking style from CCTV. The CCTV showed black sports shoes with bright stripes. He stated that he was looking for the height he had seen. He stated that there was a security light where they were. He stated that he had no differences with the accused.

22. PW5 was 224320 Cpl. Kevin Marita of Kiawara Police Station. On 26/8/2019 he was on patrol with PC Njoka and PC (Driver) Cheruiyot when they received a call from OCPD Kiawara and informed about the robbery at Kimunyuru. They found out a person had died and a shop broken into. They picked a bag, and found a green beret with a stamp of a Prison Warder, a red hat and a black marvin, one home-made gun with one bullet.

23. They recovered ID card and a black phone. The body was taken to PGH mortuary Nyeri. Exhibits were handed over. The body was 40 m from the shop. He did not see the rest of his clothes well. There is the jeans trouser, a modified stick was brought by members of the public. He identified exhibits 7, 12, 6, 2 and 8. Exhibit 16 was recovered being a leather wallet. The other 2 escaped. He could not tell the owner of goods recovered. His role was limited to visiting the scene and taking the body to the morgue. He identified exhibit 15.

24. PW6 Cpl. Mercy Mwongera testified. She was the OC Crime Mweiga Police Station. She was informed on 2/11/2019 by DCIO Kieni, CIP Stephen Ndhiwa to conduct an identification parade in respect of some offences. She conducted identification parade for Appellant on 2/11/2019 between 11 am and 12.00 noon, with 8 people on the line. The witnesses were in the office of OCS, outside the main structure.

25. It was his further evidence that the Appellant raised issue that photos had been taken and many people had seen him. 3 witnesses identified Appellant while the 4th did not. Appellant stated that he was not satisfied. PC Cyprian Otieno conducted the parade for Ngunjiri. The forms for Appellant were produced as exhibit 17. On cross examination, she stated that there were 8 members excluding the accused. She got people who had similar size, age and colour. Not all 8 were tall. She ensured that witnesses did not have contact with the accused. The suspects were identified by touching. She stated that the parade was called in just to identify the suspect. It was her evidence that section 156 of the police standing orders was followed.

26. PW7 Zablon Momanyi Makori testified that on 5/9/2019, he was from a friend's place in Kinengero in Subukia for a vigil. He met 3 people who identified themselves as police officers. He was with 2 other people, that is Wanjiku and another man. The 3 robbed them of phones and Ksh. 1,000/=. He lost an Itel phone. The three beat the witness and the 2 people including Wanjiku. The 3 asked for M-pesa PIN and they were given. This was reported at Kinengero Police Station. He was given an OB number and forgot about it.

27. On 20/9/2019 some police officers came to pick the witness from his home, that his phone had been used to commit a crime in Nyeri. He stated that he could identify a short fat man who was wearing exhibits 9 and 8. Other suspects were tall. On cross examination, he stated that he was attacked when going home. He did not see the robbers' faces. He could not pick them as the new robbery was at 10.00 pm.

28. He saw one robber well. He was wearing a long black jacket and was the one with a gun, which the witness could not know whether it was a real one or not. Of course, he did not and could not wait to find out. He could not explain how the phone was stolen after committing an offence.

29. PW8 CIP Kenneth Chomba testified that he was attached to DCI Nairobi, Forensic Department, Ballistic Section. He enumerated long qualification and numerous duties he was assigned. He had worked in ballistics for 7 years. On 30/8/2019 he received an homemade devise and 1 round of ammunition. These were escorted by 90356 Cpl. Festus Kuto and a duly filled exhibit memo to ascertain whether A was a firearm and if A was capable of firing B.

30. The said device was made of wood measuring 430 mm in length nailed together with metallic grids and tubes, hand grip, muzzle, barrel, and chamber, firing timber under tension. The device was test-fired. The exhibit 3 was a firearm caliber 7.62 by 5.1 mm, which was successfully test fired. He produced the projectile and the casing. The device was a firearm and the exhibit B was an ammunition within the meaning of the *Firearms Act*, Cap. 114 Laws of Kenya. On cross examination he stated that he did not know where it was recovered from.

31. PW9 was 78117 Cpl. Josphat Kyangu of Subukia Police Station. He was the investigating officer in another case in Nyahururu CM's 1812/2019 and the arresting officer herein. On 4/10/2019, he was on duty and received a call from Mbuchuru the Assistant Chief Subukia that two workers, a business lady and a businessman were waylaid and their phones stolen. The robbery occurred at the gate. The three were robbed of money and phones.

32. They went to the scene. They received confidential informant's information that the suspects had committed a robbery on 4/10/2019 and were drinking within Subukia. They were arrested and several items recovered. They were charged on 19/10/2019. DCI officers from Mweiga came, that they were looking for Appellant and Ngunjiri. They were in prison remand for the other case. Items recovered were also required for the case in Nyeri.

33. The witness stated that recoveries were made. They recovered, a black Itel phone was recovered, Techno touch screen phone without back cover, sports shoes with green stripes from Ngunjiri. An inventory was prepared indicating 4/10/2019 instead of 5/10/2019. He watched CCTV and identified the accused persons. Black marvin with blue mark in CCTV was won by Appellant while exhibit 10 was visible in CCTV. The items were with Appellant in prison remand where he had been arrested for a different offence. This is the offence that PW7 testified to.

34. The witness produced an inventory that had been prepared for the recoveries made from the Appellant and his co-accused. The shoes were later recovered on 20/10/2021. No second inventory was prepared. The phones were recovered from Ngunjiri one of which was identified by PW7. This clarified the issues of dates, as PW7's phone was used on 4/10/2019 not before.

35. PW11 Cpl. Joseph Mutie analyzed the CCTV footage and other materials. He was gazetted on 15/12/2006 vide Gazette No. 10284. The DVD disc and exhibit memo was brought on 14/1/2020 by 88729 PC Hillary Tanui in a sealed envelope, with instructions – extract still images, run it before court. The same was captured and printed in hard copy with 1-6 time frame of 14 hours 10 minutes 30 seconds and 6th picture 14 minutes 12.54 seconds. They were captured by camera 3. A suspect was

carrying a homemade gun with a long blue jacket, a black marvin and a light blue hat armed with a weapon produced in court. The 3 attendants were lying on the ground.

36. Court saw exhibit 8, with a man in a long coat and black marvin ransacking the shop. The 2nd suspect pulls man. The CCTV covered the entire ordeal, with photos showing. PW2 is seen transacting on phone. Photo 9 – the suspect face seen. The exhibits for the suspect outside the shop are seen. The court could see the stripes. These shoes are exhibit 3. The struggle is seen. The photos were prepared and were stamped. They were produced. On cross examination, the witness stated that the assailants could be identified though not 100%.

37. PW12 Cpl. Paul Machira of Airtel Kenya and an enforcement officer testified that he received 2 letters to identify registration documents for MSISDN (Mobile Station International Subscriber Directory Number). They were to provide IMEI (International Mobile Equipment Identity) for calls between 1/9/2019 – 18/9/2019 and 1/10/2019 – 18/10/2019. MSISDN – 0738236294 was paired with various phones IMEIs. That is 35548410613866, 359184098018300, 357388088061940, 355212089343297 and 358750072535778.

38. The callers were making calls and receiving calls, from various stations, that is, sites in Ndindika, Ngarua, Muthige, Subukia, Molo and a current issue 25305, a new station, then Nyandudo. In the first period, 1/9/2019 – 18/9/2019, callers used a phone number, MSDN, 07382336294. The said number was registered in the names of the Appellant. His details were captured as per national identity card - born on 29/9/1986, ID No. 25966527 with registration on 28/6/2019.

39. He testified that the next period was from 1/10/2019 to 18/10/2019. The said phone number was also used in 2 other phones, that is, IMEI Nos, 35403909969844 and 35844409604794. He produced the certificate and the details supplied as exhibits, 24, 25, 26 and 28. The last exhibit was a letter from the DCI, Kieni West, which was subsequently produced. On cross examination, he stated that he supplied information required and not the entire phone history.

40. PW13 PC Hillary Cheruiyot testified that he was from DCI Kieni West with investigative duties. On 27/8/2019 at 2 pm, the DCIO CIP Ndhiwa tasked him to investigate a case for robbery pursuant to a report by PW1 made on 26/8/2019. He recorded statements. He went to the scene Cpl. Marita had visited earlier and recovered items and the body of one of the robbers. Ngunjiri was identified from the footage. The contacts were gotten. Requests were made for Safaricom to give data on 0722164492. The same was owned by the deceased suspect. The number said Ngunjiri as Simon and there were calls, the last one on 26/8/2019 at 10.00 am.

41. He further testified that Airtel Kenya Ltd gave then upon request the call history of the phone paired with 0707036408. This resulted in the arrest and interrogation of PW7. The said witness recorded his statement that led to the arrest of the Appellant and his co-accused. It was his further evidence that Airtel gave data for 0738236294 that showed that impugned number was in Nyahururu. They found the owner as Regina, a sister to the Appellant who stated that the phone number belonged to Appellant. Regina also disclosed that the Appellant had earlier been arrested and was being held at Nyahururu GK Prison.

42. The witness made the necessary follow ups and confirmed the arrest of the Appellant. They found the Appellant in prison remand where he was wearing the red jacket that he had won on the day of robbery as identified from the CCTV camera. They inquired from Subukia Police Station and found the items hirtherto recovered from the Appellant.

43. Upon further investigation they established that the mobile phone and Airtel handset recovered were paired to 0738236294 while the other phone line belonged to PW7. The other items revered were an

old mask, black marvin, and white sports shoes which had been recovered from Appellant. According to the witness, these were the same items that were seen being won by the robbers in the CCTV footage during the robbery. It was his further statement that black sports shoes with yellow stripes were also recovered. He continued that these items were identified from the CCTV footage.

44. The witness stated that the witnesses were called and identified the exhibits. The details at the scene and the number showed that the number 0715 267508 belonged to Appellant's sister, while the details for registration belonged to Appellant. He testified that the suspects before court were properly identified. He produced several exhibits. He stated that 80,000/= was stolen from the shop. The said money was not recovered from the Appellant or the deceased robber.

45. On cross examination the witness stated that the phone number recovered was for Ngunjiri. It was his case that Ngunjiri and the deceased robber communicated twice on the material day. He was cross examined heavily on the shoes. He stated that they were the same as the ones on CCTV. He stated that those recovered were white shoes with grey stripes though indicated as white sports shoes. He also stated that that when the parade was done, the suspects were at Mweiga Police Station. On re-examination the witness stated that the number he requested to be examined was 0738... and not 0736...

46. The accused persons were put on their defence. They all elected to give sworn evidence. Appellant stated that he was a tomato farmer. He denied the offence. He recalls that 26/8/2019since it was very memorable for him. He stated that he made a great loss on that day. It was his case that he had travelled on 26/8/2019 and did not get a place to pack his tomatoes. They were sold on 27/8/2019. He travelled back on 28/8/2019. He spent 2 nights in a guest house.

47. He was arrested on 4/10/2019 in Subukia in a club. He recalled that the President of the republic was going to Subukia Shrine hence all clubs were closed. He stated that they arrested him, took his money and took him to his house where an inventory was prepared. He continued that the police added to the inventory other things he did not know and were not taken from his house. It was his evidence that the police only took items that they did not put on inventory; his items were taken from his house, that is, a 32" TV, whose AC was lost, 3 phones, mattress, which he provided receipts. It was his case that he did not recognize other things in the inventory. He stated that on 20th he was in custody when the shoes were recovered. He protested the identification as his photos were taken. He stated that the parade had 7 people, 4 policemen and 5 people from cells (this is actually 9 from his evidence.

48. He disowned Ngunjiri as a stranger whom he came to know when they were taking plea in Nyahururu. He stated that the plea for which he had been arrested was drinking during prohibited hours. On cross examination he stated that he took 16 crates to Nairobi in a lorry. He just stopped a lorry for mattresses. Appellant did not know where the guest house he slept in was. He stated that he slept in Marikiti. He stated that he was a sole occupant of a guest house for the 2 days. He stated he had receipts Nos. 102383 and 101980 from 2NK Sacco, which he produced in evidence.

49. The Appellant proceeded that he signed an inventory but disowned the one produced in court as a forged one. It was his testimony that he did not know Kiawara, where the offence is alleged to have taken place. He saw the CCTV footage but he was not in the CCTV. He stated that the complainant identified him in an identification parade but protested on the propriety of the parade. He stated that his photograph had been taken. He stated that the robbery was carried by masked people and had requested to be masked but there was no compliance.

50. On re-examination he stated that receipts are for two nights. He stated that it is the investigating officer who took the photographs while he was in Nyahururu for identification.

51. Ngunjiri testified that he knew Appellant from the time he was charged with him in Nyahururu and not before. On 26/8/2019 he was counted in Subukia. He was arrested on 4/10/2019. He had gone to a club at Sokoni area to enjoy a drink. Those who raised 3,000/= were fined for drinking past hours. He could not raise and was charged with robbery. Only an Itel was found on him. The police also recovered 2 phones without a battery. No shoes were recovered except on 20th when he was in custody. He stated that PW1 was a neighbor and relative. They had a grudge. It was his evidence that they did not get along well. He challenged the parade.

52. On cross examination he stated that he did not know Appellant. His evidence was that on 26/8/2021 he was at home with his wife; she has since gone back to her parents. He signed an inventory and was not forced. He stated that he had a grudge with the complainant. He stated that he was not on it. Ngunjiri testified that he is not sure the items on the CCTV are the ones in court. He knew Kiawara well as his parents stay there. His case was that one robber was killed. It was his case that he did not assist Appellant escape as he was not at the scene. He stated that he declined to participate in the parade as they were coming to pick someone they knew.

53. The Appellants were found guilty as charged. They mitigated that they had been in custody since 2019. It is their case that they had been in custody for 2 years. The court considered this and gave 15 years imprisonment on 6/10/2021.

Submissions

54. The Appellant filed submissions on 28/7/2024 and submitted that the trial court erred in convicting the Appellant based on circumstantial evidence. In this regard, it was submitted that the evidence was based on conjectures, was not firmly established, and so could not point towards the guilt of the Appellant. He relied on Daniel Mwembe Oloo vs Republic Criminal Case No. E027 of 2021 and Abanga alias Onyango v Republic Criminal App No. 32 of 1990. The Appellants also submitted that the identification parade was not of any evidentiary value and did not base on what the witnesses saw at the scene of the crime.

55. It was also the submission of the Appellants that the trial court erred in relying on evidence obtained in breach of Article 50(4) of *the Constitution*. He cited Hamis v DPP 1952 AC 694 to submit that admission of some piece of evidence obtained from an accused person by trick would no doubt be ruled out by a judge. He further, submitted that the trial court erred in not appreciating the 2nd Accused person's defence and shifted the burden of proof to the Appellant.

56. The Respondent filed submissions on 8/3/2024. It was submitted that the trial court properly established based on the available evidence that the charge of robbery with violence was proved against the Appellant beyond reasonable doubt. That there was no contradiction in evidence of the prosecution.

57. The Respondent also submitted that the investigations were done to the required standards. It was their submissions that the identification parade was properly conducted leading to identification of the Appellant. Reliance was placed on the case of John Ngunjiri Kamau v Republic [2014] eKLR where the Court of Appeal held that identification parades are meant to test the correctness of a witnesses' identification of a suspect.

58. The prosecution maintained that evidence ranging from CCTV footage and the crucial witness properly linked the Appellant with the offence as charged and led to a proper conviction by the trial court. Reliance was placed on Bukenya & Others v Uganda [1972] EA 549 to submit that the

prosecution called witnesses sufficient to establish a fact and there was no necessity in calling all people who knew about the case.

59. On sentence, it was submitted that mitigation was considered and there was no mandate under Section 169 of the Criminal Procedure Code on the contents of the judgment to contain mitigation. It was their case that the judgment was proper. Section 169 of the Criminal Procedure provides as follows:

1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code (Cap. 63) or other law under which, the accused person is convicted, and the punishment to which he is sentenced.

(3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty

Analysis

60. The duty of the first Appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya v Republic [1957] EA 336 as follows:-

> “ On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

61. In the case of Okeno v Republic [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

> “ 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.”

62. The issue in this case is whether the prosecution proved its case to the required standards. Most oft quoted English decision of by Viscount Sankey L.C in the case of H.L. (E) Woolmington v DPP [1935] A.C 462 pp 481 , comes in handy in describing the legal burden of proof in criminal matters, that;

> "Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

63. In the case of R v Lifchus {1997}3 SCR 320 the Supreme court of Canada explained the standard of proof as doth:-

> "The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

64. According to Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:

> "The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."

65. The standard of proof required in such cases was addressed by Brennan, J in the United States Supreme Court decision in Re Winship 397 US 358 {1970}, at pages 361-64 that:-

> “The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.”

66. In criminal cases, the standard of proof is beyond reasonable doubt and it was due to this that Mativo, J (as he then was) in Elizabeth Waithiegeni Gatimu vs. Republic [2015] eKLR expressed himself as hereunder:

> “To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant’s guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty...Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favorite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.”

67. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The Court of Appeal posited as follows in the case of Moses Nato Raphael vs. Republic [2015] eKLR:

> “What then amounts to “reasonable doubt”? This issue was addressed by Lord Denning in Miller v. Ministry of Pensions, [1947] 2 ALL ER 372 where he stated:-‘That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.’”

68. The main issue in this matter is whether the court erred in finding the Appellant guilty. In other words, did the prosecution discharge its burden of proof? In this one single issue there are 6 sub issues. There

is also a second and ancillary issue of the severity of sentence. the appeal therefore raises the following sub-issues on conviction:

i. The rights under Section 211.

ii. Rejecting the defence evidence

iii. Corroboration of evidence.

iv. Reliability of recovered exhibits and CCTV footage.

v. Identification parade.

vi. Material witnesses.

Compliance with Section 211 of the CPC

69. The court complied with Section 211. The same provides as follows:

(1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).

(2) If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of those witnesses is not due to any fault or neglect of the accused person, and that there is a likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process, or take other steps, to compel the attendance of the witnesses.

70. I do not see any point of attack on the compliance with the section. The Appellant was represented by Mr. Gichuki Advocate throughout the trial. He elected that each of the accused was to give sworn evidence and had no witnesses. It is my considered view that failure to record the exact words of Section 211 of the Criminal Procedure Code did not in any way prejudiced the appellant. There is no material placed before me on this single sub issue. In Kossam Ukiru v Republic [2014] eKLR, the Court of Appeal posited as doth: -

In our view, the appellant is hanging on straws. He was ably represented by counsel and unambiguously elected to give a sworn statement when the provisions of Section 211 were explained to him. After that statement, his counsel informed the trial court that that was the close of the appellant's case. We do not think that failure to record the exact words of Section 211 of the Criminal Procedure Code in any way prejudiced the appellant. There was, in our view, no failure of justice and the appellant's complaint in that regard lacks merit and we reject it.

71. The issue of compliance with section 211 of the Criminal Procedure Code is a red herring and has no substance. The record indicates that after explanation, on section 211, the Appellant opted to give sworn evidence. The sub issue is thus baseless.

Rejecting the defence evidence

72. At this point, I must also consider the evidence. For Appellant, he alleged to have been in Nairobi on 26/8/2019 and 28/8/2019. He produced 2 receipts for travel on the two days, that is, 26/8/2019 and 27/8/2019. He also produced 2 receipts for sleeping in a Guest house in Nairobi. The receipts were serially following each other, that is 3601 and 3602 but for 2 different days. They appear on the face of it not genuine. However, being an alibi, there is no duty of the Appellant as an accused person to displace the same. An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view as stated by the Court of Appeal in Erick Otieno Meda v Republic [2019] eKLR where they observed that:

> " In considering an alibi, we observe that:
>
> a. An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.
>
> b. An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.
>
> c. The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.
>
> d. The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail. (See Mhlungu v S (AR 300/13) [2014] ZAKZPHC 27 (16 May 2014)."

73. The receipts for transport on the other hand, tell a different story. The Appellant travelled to Nairobi from Nyahururu on a 9 passenger service bus. He returned on 28/8/2019. He did not produce any receipt of Cess showing payment for the produce he was selling. He did not transport the same through a Pick up but a lorry carrying mattresses. The alibi gave a gaping hole of more than 24 hours. The alibi taken together with other evidence, does not in any way puncture the prosecution case. In a rather uncanny way, it corroborates the prosecution case.

74. However, the evidence by PW12 was on the location of phones. PW13 produced evidence on the jackets which Appellant was wearing. He had stolen a phone from PW7. He did not bother explaining how it came in his possession. The goods recovered from Appellant was in the CCTV footage, at the locus in quo.

75. However, I wish to point out that the trial court was wrong in its summary of the Appellant's defence that the Appellant stated that he was arrested for breach of Covid-19 protocols. The correct position was that the Appellant was arrested for drinking during prohibited hours. However, other than a minor mischaracterization of that evidence, the court was correct in its analysis.

76. The court rightly stated that PW1, PW2 and PW3 positively identified Appellant. The witnesses identified Appellant at an Identification Parade. PW2 and PW4 knew Ngunjiri well. The duo were not cross-examined on any ill will. PW4 was seen as a truthful witness. He struggled with a person who turned out to be Ngunjiri. He gave evidence that was cogent. It displaced the alibi as false.

77. There was no serious doubt on CCTV. The requirements of Section 106B(4) were complied with. Section 106B(4) of the *Evidence Act* provides as follows:-

In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any matters to which conditions mentioned in subsection (2) relate; and

(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.

78. The evidence was cogent on identification parade. All caution was taken to ensure that the same was free from error. In this case, where evidence is that of persons known to the parties, a parade is not useful. The court has to consider the weight to be attached to the said identification evidence. The Court of Appeal dealt with issue of whether the identification parade was properly conducted in the case of *David Mwita Wanja & 2 others –vs- Republic - Criminal Appeal No. 117 of 2005*:-

> "The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders. See R v Mwango s/o Manaa [1936] 3 EACA 29. There are a myriad other decisions on various aspects of identification parades since then and we need only cite for emphasis Njihia v Republic [1986] KLR 422 where the court stated at page 424: -
>
> "It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime."

79. The courts have held that evidence of recognition is far much more reliable than mere identification alone. This was well enunciated in the case of Anjoroni v Republic 1980 KLR 59 to deal with the issue of identification of a stranger. The Court of Appeal observed that:

> "Recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or the other."

80. Further, for the totality of the identification PW2, PW3 and PW4 were able to participate in a parade that is in consonance with Section 156 of the Police Standing Orders which sets out the Force Standing Orders in regard to identification parades.

81. One of the prerequisites of a fair parade is that the witnesses ought to give a description of the suspect to the police officer in charge of the crime so that the officer arranging the parade picks members to the parade who, as much as possible, fit the description of the suspect. When parades are not arranged or conducted with scrupulous fairness then their evidential value is lessened or annulled.

82. The Appellant posits that a material witness was not called. These witnesses were not named and of what particular importance they could be having on the case. The courts do not just deal with plurality of witnesses but material witnesses. Section 143 of the *Evidence Act* (Cap 80 Laws of Kenya) provides as follows:-

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

83. It is true that where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make the adverse inference that if such evidence was produced, it would be adverse to such a party. However, there should be evidence of existence of such witnesses. In this case no material witness was left out. Indeed, the prosecution went for an overkill, calling PW 7 to testify on the phones that was stolen, when he was unnecessary. In Donald Majiwa Achilwa and 2 other v R [2009] eKLR the court stated:

> "The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses' evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case. (See Bukenya & Others v. Uganda [1972] EA 549). That is, however, not the position here. We find no basis for raising such an adverse inference."

84. In Keter v Republic [2007] 1 EA 135 the court held inter alia that the prosecution is not obliged to call a superfluity of witnesses but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt. In this case the court correctly warned itself of the dangers of identification as stated in Kariuki Miri & 7 others v Republic. The identification parade herein was useful for Appellant and not Ngunjiri. The evidence was clear that the identification parade for Appellant was properly carried out. He was identified.

85. It is my finding that there were no witnesses who ought to have been called but were never called. The evidence tendered against the Appellant was strong on its own. The phone numbers tracked Appellant

and Ngunjiri to the same point. A postulation that one was at home in Subukia is not an alibi. The same is not worth considering as an alibi.

86. The IMEI Number places Ngunjiri and the deceased in two phone calls. The evidence was not rebutted. The items recovered including shoes were seen in CCTV, recovered and also as per the witnesses' testimony. The red jacket placed Appellant in the locus in quo.

87. The evidence of witnesses corroborated each other. PW1 places Appellant in the locus quo. This is corroborated by the CCTV. The same CCTV places Ngunjiri in the crime scene. The assailants were armed with a homemade gun and a Somali sword. This is seen on CCTV. The same with a gun. Violence was used and actually threatened.

88. PW8 confirmed that the homemade gun was a firearm and the ammunition could be fired from the homemade gun. The evidence of PW3 corroborates the presence of a single bullet in the hands of Appellant. PW2 and PW1's evidence shows that there was violence. The crime was carried out in company of others. Section 296(2) of the Penal Code provides as follows:-

    If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

89. PW4 confronted an armed robber, who later turned out to be Ngunjiri as per the CCTV. PW5 Cpl. Marita confirmed the robbery and recovered a body of one of them. PW6 on the other hand conducted a parade in respect of Appellant. He was not known to Appellant. The witness had no known grudge as he was not known to the Appellant before they relieved him of his phone.

90. The second parade was conducted professionally and was to the point. PW7, problematized the entire gamut of the case, the chain that finally broke the camel's back. Appellant was the short man who robbed, PW7. He did not bother to change clothing. This was recovered in circumstances that placed him in a position he needed to explain the coincidence.

91. Section 111 of the *Evidence Act* provides that when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him. The said section further states that:

    Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

    Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

    (2) Nothing in this section shall—

        (a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or

        (b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or

(c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity.

92. PW8 thus proved that the Appellants were armed with a dangerous weapon, namely a homemade gun. The charge read that on the 26th day of August 2019 at Kimunyuru Trading Centre in Kieni West Sub County within Nyeri County, jointly with another not before court being armed with dangerous weapons namely one homemade gun, one sword, one knife and one bonfire made stick robbed Ezekiel Warugongo Kamau cash of Ksh. 80,000/= and immediately before or immediately after the time of such robbery threatened to use violence to the said Ezekiel Warugongo Kamau.

93. These weapons are in the hands of one or the other Appellant. It matters not whether only one was armed or that not all weapons were carried. The Court of Appeal in Peter Ngunjiri Kamau v Republic [2013] eKLR stated as follows:

It is also clear from the record that, the robbers were in possession of a pistol, a dangerous weapon and with iron bars which were used to inflict harm upon PW1. Thirdly, they did in fact inflict violence upon PW1 and PW2 in the course of the robbery. Any one of these three ingredients was sufficient to support a conviction of the appellant with the charge of robbery with violence.

94. PW9 made recoveries in a short span. The things recovered were recently involved in a robbery. The doctrine of recent possession entitles the court to draw an inference of guilt where the accused is found in possession of recently stolen property in unexplained circumstances. The Court of Appeal summarized the essential elements of the doctrine of recent possession in Eric Otieno Arum v Republic KSM CA Criminal Appeal No. 85 of 2005 [2006] eKLR, where the court stated as follows:

In our view, 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; secondly, that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.

95. Therefore, once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for the possession. This burden is evidential only and does not relieve the prosecution from proving its case to the required standard. That explanation need only be plausible. In *Paul Mwita Robi v Republic KSM Criminal Appeal No. 200 of 2008*, the Court of Appeal observed that;

Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is (sic) especially within the knowledge of the accused and pursuant to the provisions of section 111 of the *Evidence Act* Chapter 80, the accused has to discharge that burden.

96. The nature of the items recovered were that inevitably the Appellant was in possession of them, and showed that he was the thief. The jacket that was recovered was the same won by the Appellant. There was no error shown to have been committed by the court below.

97. On corroboration, PW11 played the video from CCTV, which had been installed that very day. The video had barely run for 14 hours on the material day. The robbers must have known otherwise. The Appellant was squarely placed in the locus in quo.

98. PW13, the investigating officer tied the offence for which the Appellant was charged to the Appellant. It is not enough to posit that there was no direct evidence to connect the Appellant to the crime. The evidence tendered was both direct and circumstantial. On circumstantial evidence the threshold as stated in R v Kipkering Arap Koske [1949] 16 EACA 135, is that such evidence must exclude co-existing circumstances which would weaken or destroy the inference of guilt. In Sawe vs Rep [2003] KLR 364, the Court of Appeal expressed that:-

> " In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused."

99. Based on the above analysis, I also find no contradictions in the evidence by the Prosecution as alleged in the Supplementary Record of Appeal. The prosecution tendered overwhelming evidence that implicate the Appellant. The trial court correctly returned the verdict of guilty on the part of the Appellant as charged.

100. Minor contradictions show natural perceptions by witnesses depending on their recollection of event and their position in the evidential chain. It is not expected that PW4 who was outside the shop will have similar recollection as PW1. It is also not expected that PW1 and PW2 will have similar recollections having been lying on the floor at different times.

101. Superior Courts have held that minor contradictions cannot in the glare of overwhelming evidence that establishes the guilt of an accused person go to the root of disproving guilt. The court will be inclined to disbelieve robotic evidence where witnesses use the very same sentences, idiomatic expressions and get the same nuances in a robotic manner. The courts must as a corollary give room to human perception and prior experiences. The Court of Appeal of Tanzania addressed the issue of discrepancies in evidence in Dickson Elia Nsamba Shapwata & Another v. The Republic, Cr. App. No. 92 of 2007 and concluded as follows, a view we respectfully adopt:

> " In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."

102. There are no discrepancies or contradictions noted in the appeal. The Appellant was unable to puncture rock solid evidence in terms of identification and the elements of the offence.

103. The Appellant threw in a question of a fair trial. However, no material were placed before the court. The materials recovered has no or very little bearing on the guilt of the Appellant. The identification and recognition was paramount. The alibi collapsed on the face of the overwhelming prosecution evidence placing the Appellant in the locus in quo.

104. I do not find any error necessitating vitiation of the conviction. The case had been properly proved beyond reasonable double. In the circumstances the appeal on conviction is dismissed.

105. On sentence, I am persuaded by the sentencing guidelines. The Supreme Court has propounded them in Francis Karioko Muruatetu & Another v Republic [2017] eKLR. The following are guidelines with regard to mitigating factors before sentencing.

(a) age of the offender;

(b) being a first offender;

(c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender;

(h) any other factor that the Court considers relevant.

106. The offence for which the Appellant was charged with attracts a death penalty. In Kenya, death sentences are usually commutated to life imprisonment by administrative fiat. As was held by the Court of Appeal in Thomas Mwambu Wenyi v Republic [2017] eKLR citing the decision of the Supreme Court of India in Alister Anthony Pereira Vs State of Mahareshtra at paragraph 70-71:

> " Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.

107. The court gave a lenient sentence of 15 years. The objectives of sentencing as set out in the 2023 sentencing guidelines are as follows: -

> " 1. 3.1 Sentences are imposed to meet the following objectives. There will be instances in which the objectives may conflict with each other – insofar as possible, sentences imposed should be geared towards meeting the objectives in totality.
>
> i. Retribution: To punish the offender for their criminal conduct in a just manner.
>
> ii. Deterrence: To deter the offender from committing a similar or any other offence in future as well as to discourage the public from committing offences.

iii. Rehabilitation: To enable the offender to reform from his/her criminal disposition and become a law-abiding person.

iv. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages sustained by the victim or the community and to promote a sense of responsibility through the offender's contribution towards meeting those needs. Community

v. Protection: To protect the community by removing the offender from the community thus avoiding the further perpetuation of the offender's criminal acts.

vi. Denunciation: To clearly communicate the community's condemnation of the criminal conduct.

vii. Reconciliation: To mend the relationship between the offender, the victim and the community.

viii. Reintegration: To facilitate the re-entry of the offender into the society"

108. An appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factors, or took into account some wrong material, or acted on a wrong principle. The Court of Appeal, in the case of Bernard Kimani Gacheru v Republic [2002] eKLR stated as hereunder:-

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."

109. Thus sentence is an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was adopted, as held in the case of Shadrack Kipkoech Kogo v R. Eldoret Criminal Appeal No. 253 of 2003 where the Court of Appeal stated thus:-

> " sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka v R. [1989 KLR 306]"

110. This court as such cannot alter a lawful sentence unless it is shown the court overlooked some factors. None have been shown. The Court of Appeal in the case of Ogolla s/o Owuor vs. Republic, [1954] EACA 270, pronounced itself on this issue as follows:-

> " The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

111. An appellate Court must be careful not to interfere with such a decision, unless it is demonstrated that the sentence was manifestly excessive. Justice R. Lagat-Korir, posited as follows in the case of Hillary Kipkirui Mutai v Republic [2022] eKLR,

9. Sentencing is an important aspect of the administration of justice. Noting that sentencing is based on a judicial officer's discretion, this Court must be careful not to interfere with such a decision, unless it is demonstrated that the sentence was manifestly excessive, was illegal, improper or founded based on misrepresentation of material facts.

112. The court said that she was taking into consideration the period they have stayed in custody. The same must be expressly stated. In this case the death penalty is the punishment provided. In other circumstances, death penalty should have been ideal. The mitigation was superficial. The Appellants escaped a death penalty through the lenient sentence.

113. There is no basis to interfere with sentence which in my considered view is lenient. The appeal therefore lacks merit and is accordingly dismissed.

114. I note that the court indicated as follows:

> " The court has taken into account the two years they have been in custody but a deterrent sentence is needed. They are lucky they were not killed by the mob that killed their accomplice. Each of the accused persons to serve 15 years imprisonment."

115. There is no record that the period in custody was taken care of as provided by Section 333(2) of the Criminal Procedure Code. The said section provides as follows

(2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

116. The circumstances demand that Section 333(2) be applied. It is not enough to say that I have taken the period spent in custody. In the circumstances and for avoidance of doubt it is clarified that the sentence shall start from 4/10/2019. The other days the Appellant was in custody for a different offence in Nyahuriu as indicated in the charge sheet.

Order

117. In the circumstances I make the following orders:-

a. The Appeal on conviction and sentence is dismissed. The appeal on sentence is equally dismissed. However it is clarified that the sentence shall run from 4/10/2019 when the Appellants, who were hitherto in custody for other offences were arraigned.

b. The file is closed.

DELIVERED, DATED AND IGNED AT NYERI ON THIS 16TH DAY OFOCTOBER, 2024.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

Represented by

Mr. Mwakio for the State

Appellant in person

Court Assistant – Jedidah