



**Mugo & another v Republic (Criminal Appeal 12 & 13 of 2018  
(Consolidated)) [2023] KEHC 1834 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1834 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CRIMINAL APPEAL 12 & 13 OF 2018 (CONSOLIDATED)**

**FR OLEL, J  
MARCH 2, 2023**

**BETWEEN**

**STEPHEN MWANGI MUGO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**AS CONSOLIDATED WITH  
CRIMINAL APPEAL 13 OF 2018**

**BETWEEN**

**SYMON WAWERU MURIGI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from conviction and sentence of Hon. E.H Keago (SPM)  
in Baricho SPM CR.No.1541 of 2015 dated 29th January 2018)*

**JUDGMENT**

1. Both appellants were charged with the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the *Penal Code*. The particulars were that on the 1<sup>st</sup> day of October 2015 at Karima village in Mwea West Sub county, within Kirinyaga County jointly with others not before court while armed with crude weapons namely metal bars robbed Pius Murimi five herds of cattle and eight pigs all valued at Kshs 854,000/- (eight hundred and fifty four thousands shillings), the property of Samuel Kinuthia Ng'ang'a and at or immediately before or immediately after the time of such a robbery fatally wounded the said Pius Murimi.



2. The prosecution called eight (8) witnesses who testified in support of the prosecution case. Both accused who were the 3<sup>rd</sup> and 4<sup>th</sup> accused person in the primary trial court opted to give sworn testimony and did not call any witness.
3. Both appellants were convicted on the charge of robbery with violence and sentenced to death.
4. The appellant did file two separate appeals being Kerugoya High Court Criminal Appeal No 12 and 13 of 2018. Since both appeal arose from a single conviction, both appeals were consolidated by an order of this court dated 22/6/22.
5. Both appellant's did file their petition of appeal which raised several grounds of appeal. The common grounds of appeal were that;
  - a. The trial magistrate erred in law and fact in convicting the appellants while relying on evidence of identification which remain doubtful and questionable as circumstances favouring positive identification were not in existence.
  - b. The trial magistrate erred in law and fact by relying on insufficient evidence to convict the appellant's. Further the trial magistrate relied on witnesses who were not credible and disregarded evidence of the defence.
  - c. The trial magistrate erred in law and facts in returning a finding of culpability on the part of the appellant to a case whole dependent on circumstantial evidence without corroboration.
  - d. The trial magistrate erred in law and fact by introducing extraneous matters not conveyed in court and which had no basis as evidence tendered before him which matter led him to make a wrong final conviction.
  - e. That the trial magistrate erred in law and fact in failing to consider the eviction of both prosecution and defence in their entirety hence arriving at an erroneous finding.
  - f. That the trial magistrate erred in law and facts by not considering that the prosecution case was not proved to the required standard of beyond reasonable doubt.
  - g. That the trial magistrate erred in law and fact by rejecting my alibi defence and mitigation contrary to section 169(1) of CPC.
6. In their written submissions the appellants also petitioned court to intervene and set aside the harsh and excessive death sentence imposed and in its place be pleased to impose a less severe sentence.
7. The appellant both prayed that their appeals be allowed and the conviction and sentence in Baricho Senior Principal Magistrate criminal case No 1541 of 2018 be set aside.

### **Evidence of Trial**

8. PW1 Samuel Kinuthai Nganga stated that he worked at Kirinyaga County as a deputy enforcement officer and was also a farmer. On 30/9/2015, he went to his farm at about 9.00pm and found his farm hand James sleeping and he could not wake up. He proceeded to tether the cow and locked up the gate with a chain. At about 1.00am, his worker called him to report that some youth had come to warn him not to seduce their daughters and he said he could identify some of the youth. After 10 minute his worker called him again to say that the youth had left.
9. At about 3.00am he was called and informed that his home was being raided and there was a motor vehicle leaving the compound. He rushed to the police station to make a report and later proceeded



- to his home where he found one of his workers had been tied on his hands and was bleeding from his nose. The said worker/farm hand was already dead. He also discovered that his five cattle (two bulls and 3 cows) and eight pigs had been stolen.
10. The next day they mounted a search for the stolen animals. On 2/10/2015 he got a tip where the animals could have been sold. They went to Ndiambo village, the home of J.J they found 4 animals and 4 pigs. On inquiring from J.J where he got the animals from, he said the animals were taken to him by Wanjohi, Kamwere and Tony. PW1 also identified 12 photographs which were taken of the animals stolen which according to him were valued at Kshs 854,000/- and later recorded his statement at the police station
  11. PW1 Samwel Kinuthia Nganga identified accused 1 and 2 as persons who were not known to him before but at whose home the animals were recovered and he also identified the 2<sup>nd</sup> appellant herein as the person mentioned by 1<sup>st</sup> accused.
  12. In cross examination, he confirmed that the animals which were stolen were found at the home of the appellant co-accused (home of accused 1 and 2) were his livestock and that Tony, Kamwere and Wanjohi of Makutano were the ones who brought the animals to the home of the appellant's co-accused (1<sup>st</sup> and 2<sup>nd</sup> accused at the trial).
  13. PW2 Moses Kago Karanja stated that on 30/9/2015 at 9.00am he travelled to Nairobi to run his errands and returned at about 8.00pm. He was with PW1 Samwel Kinuthia Ng'ang'a and they went to his home when they found the herds boy asleep. They took the milk and locked up the home. He later woke up the herds boy and told him that PW1 had already taken the milk. The herds boy then went to the shop to buy soap to wash clothes.
  14. PW2 stated that at about 10.00pm he heard the herds boy talking to some people. The herds boy came back and told him that there were some youths who were alleging that he was spoiling his girls. The youth said they had been sent by one Mr. Waweru. Alarmed by what had transpired. PW2 and the herd boy crossed to the homestead of mama Kinyua and reported the incident.
  15. While at Mama Kinyua PW2 and his colleague saw the youth return one 'Deno' (deceased) went to meet them and PW2 and the herd boy followed him. PW2 stated that the youth were 4 in number and the parties spoke for a reasonable period of time while still engaging the youth he was grabbed by his neck and placed on the ground by two people. His fellow workers took off while screaming and was persued by two people. While on the ground he saw the animals being stolen and motor vehicle being brought, which was used to ferry away the stolen animals.
  16. After the attackers had left PW2 run and went to Mama Kinya's home where an alarm was raised as they screamed. They went back to the scene to look for the worker and discovered his body inside the shamba. He had been killed.
  17. PW2 stated that he saw the appellants at the scene of crime and confirmed that they were amongst the persons who attacked them. He alleged that it was the 1<sup>st</sup> appellant who neck chocked him while the 2<sup>nd</sup> appellant is the one of those who chased after the herdsman with others. He also stated that he spoke to the 1<sup>st</sup> appellant for long and period could recognize him by his voice.
  18. On cross examination, PW2 insisted that he was able to identify the 1<sup>st</sup> appellant as he was the one who grabbed him by the neck and that there was moonlight which enabled him to identify him clearly. Further PW2 said that the other feature which made the 1<sup>st</sup> appellant stand out was his height and voice. He reiterated that while pinned on the ground he partly saw what was happening.



19. As regards the 2<sup>nd</sup> appellant PW2 also insisted he saw him on the night the animal were stolen as he had also spoken with him at the gate of Nganga. He stated that he was able to identify him as they had spoken for long and also served him with drinking water. There was moonlight and that was sure of positive identification.
20. In re-examination PW2 reiterated that they spoke to the appellant's for nearly one hour and was sure he was amongst the group that stole the animals. As regards the 2<sup>nd</sup> appellant he stated that he was the only brown one and also recognized him by appearance. He also saw them drive away the cows while pinned down barely one meter away. He stated that "I was down at the gate as you passed with the cows".
21. PW Esther Wanja Wachira testified that on 1/10/2015 at 2.00am two persons known as "Kago" and "Pius" called them and informed them that some 3 youth had come to warn Pius to leave the daughter of Karema. Both "Pius" and "Kago" worked for one Mr. Nganga who was their neighbour. Later the same night she saw some motor vehicle light reflect on their bedroom window. The husband went to check what was happening and returned to inform her that the motor vehicle was loading their neighbours cows and pigs.
22. She called PW2, but he did not pick his phone and then called Sgt Nyaga to help them. PW2 then came to her home with his hand tied by rope and a piece of cloth in his mouth. He reported that the cows and pigs had been stolen.
23. PW3 called PW1 and reported to him what had transpired. While at the scene of crime she started looking for the herds boy but she did not find him. The other youth had his legs tied up on the gate. Later they discovered that the herds boy (Pius) had been killed. She also identified the stolen animals on the photographs taken later by scenes of crime.
24. In cross examination she confirmed that while talking to PW2 initially, he saw some people pass by the road but she did not know them.
25. PW4 Joseph Wachira stated that on 1/10/2015 at about 2.00am they were woken up by "Kago" and "Pius". They had come to report that there were 3 youth who had been sent to come and warn Pius to leave their daughters alone. While still talking he heard Pius say that one of the youth had come back and they returned to Nganga's home. At about 3.00am he saw motor vehicle lights shine on his window. He came out of the house and saw animal being loaded into the said motor vehicle. He stated that he saw it by help of lights from security lights and moonlight.
26. PW4 returned to the house and called Sgt. Nyaga and other neighbours. His wife PW3 also started to scream causing the robbers to speed off. They followed the said robbers to the road and found one pig which they untied and returned it to Mr. Nganga compound. They found out that Pius had been killed. He concluded by stating that he was not able to identify the people who stole the animals.
27. PW5 Lazaras Munene Waikuru stated that he was a bullcart driver. On 1/10/2015 at 2.00am he heard screams from his neighbours and came out to investigate what was happening. He found out that a theft incident had occurred at Mr. Nganga compound where his cows and pigs had been stolen. During the incident one of Mr. Nganga staff had been killed and they saw his lifeless body. On 2/10/2015, he was arrested and place in custody for 3 days and later released. He stated that he did not know who stole Mr. Nganga cows and pigs.
28. PW6 AP Sgt Joseph Nyaga testified that on 1/10/2015 at about 3.00am he was at the post when he received a distress call from a member of Nyumba Kumi Ngari village, who reported that he home of Samwel Nganga had been invaded by robbers. He mobilized his colleague and responded swiftly and on arrival found out that he robbers had escaped. At the scene he noted that one employees known as



- “Pius” had been killed. He called his boss and OCS and informed them of the incident. Further they opted to alert officers manning the road block at MakutaNo
29. On 2/10/2015 PW1 Samwel Nganga called him and reported that there were some livestock which had been stolen from him and were spotted being offloaded within an estate at Mwea. He mobilized two of his colleagues and also informed AP incharge of Kirinyaga West for reinforcement. The informer directed them to the home of one Gichuru Gicovi (accused 1 during trial) which home was walled and therein they recovered four cows and four pigs belonging to PW1. The same were photographs and Gichuru Gicovi and his wife Jane Kaari were arrested
  30. The arrested couple stated that they bought the recovered animals from Tony, Kamwana and Wanjohi. He never saw or arrested both the appellant’s herein. On cross examination by the appellant’s herein, the witnesses stated that he did not see any document availed to show how the cows were bought and also confirmed that the public did not give them a description of the suspect.
  31. PW7 Dr. Ndirangu Karomo performed the post mortem of the late Pius Murimi on 8/10/2015 at Kibugi funeral home. The body had multiple bruises convening the face scalp and neck. There was blood oozing from the mouth and a laceration on the oral micosar. On the head he had multiple sub scapular hemorrhage bleeding inside the scalp. He had sub-head haematoma bleeding in the brain on the sides of the head bilaterally. He formed the opinion that the cause of death was cardiac respiratory arrest secondary to severe head injury caused by a heavy blunt object. He signed certificate of death No 0028591 and produced the post mortem report as exhibit 2.
  32. PW8 Cpl Christopher Oroko was the investigating officer. On 1/10/2015 he was assigned duty by DCIO to visit a scene of robbery with violence at Keria village within Kirinyaga West. He went and found that herds of cattle and 8 pigs had been stolen. At the scene they found out that somebody had died and his body had been removed from the scene by the OCS. At the scene they also discovered/ found a steel rod which had been used to break into the compound on the same day they also arrested one suspect who was guarding the home.
  33. On 2/1/2015, he was called and informed that the cows had been discovered at a plot within Mwea in Diamu estate. He proceeded to the said estate and met Sgt Nyaga and the complainant PW1. They had recovered 4 cows and 4 pigs. Both the owner of the house at Diamu estate and his wife were arrested and placed in custody
  34. During interrogation Moses Kagwe (PW2) stated that he could identify the people who attacked them. On 6/10/2015 1st appellant was arrested and brought to the cells whereby PW2 called the witness and informed him that one of the persons who had attacked then had been arrested and was in the cells. The witness went to the cells and PW2 identified 1<sup>st</sup> appellant. Later on 8/10/2016, PW8 also arrested the 2<sup>nd</sup> appellant on grounds that he had been adversely mentioned by the owner of the home were the cows were recovered.
  35. PW8 confirmed that accused 1 and 2 before the trial court (Gichuru Gicovi and Jane Kaare) stated that it was the appellant’s who sold to them the cows and pigs and also requested him to keep them motor vehicle which had broken down and then proceeded to Embu.
  36. Further PW2 positively identified the 1<sup>st</sup> appellant at the cells and that it was not necessary to conduct an investigation parade. The witnesses finalized by producing into evidence all the photographs taken and the metal rod.



37. On cross examination, PW8 confirmed that PW2 wrote in his statement that he could identify the robbers and that it is accused 1 and 2 at the trial who also confirmed that it is the appellants who sold to them the stolen cows though there was no receipt or agreement when parties were transacting.
38. Finally the investigating officer denied that they had framed the appellants with trumped up charges.
39. Both appellants were placed on their defence and they opted to give sworn testimony and no witness to call.
40. The 1<sup>st</sup> appellant stated that he stayed at Ngurubani town and was a boda boda rider. He stated that on 6/10/2015 at about 5.00pm he was arrested by 2 AP officers for failing to wear a helmet and reflector. He was locked up at Wang'uru police station and the following day interrogated about what went on 30/9/2015. He told the investigating officer that he was with bodaboda operations and closed work at 10pm. In cross examination he stated that on 30/9/2015 he could not recall where he was, but normally he would close business and get home to rest. He denied being at the home of the complainant on 30/9/2015.
41. Finally he stated that he did not know PW2 who was at the cells and he had another case at Runyenjes of being found with a stolen phone. On being cross examined by court, the 1<sup>st</sup> appellant stated that he moved to Mwea in 2014 and the complainant used to know him as a footballer at Sagana.
42. The 2<sup>nd</sup> appellant said he stated at Makutano and was a farmer. On 8/2/2016, he had gone to Ngurubani to buy medicine for his crops and was arrested by the police in the strength of a warrant of arrest issued from Muranga court. He was thereafter charged jointly with the other co-accused with the present offence.
43. In cross-examination, he confirmed that he knew the 1<sup>st</sup> accused (at trial) and was previously in love with his daughter. He heard the 1<sup>st</sup> accused saying that he knew him well but denied meeting him at any livestock market and also stated that he did not sell any cow to the 1<sup>st</sup> accused while in the company of the 3<sup>rd</sup> accused and ascertained that the 1<sup>st</sup> accused lied against them. On cross examination by court, he confirmed that he was acquitted in the Muranga case.

### **Appellant Submissions.**

44. The 1<sup>st</sup> appellant stated that the magistrate failed to consider the evidence on record, the contradictions and inconsistencies from the prosecution and the state witnesses. According to the 1<sup>st</sup> appellant PW1 gave hearsay evidence when he stated that the animal were taken to J.J by Tony and Wangohi yet no witness recorded a statement to that effect nor testified about the same in court. Secondly an agreement of receipt was essential to determine the matter or simply an investigation to DW1 neighborhood to determine whether he possessed pigs in question as the rightful owner.
45. The 1<sup>st</sup> appellant further stated that the evidence of PW1 and DW1 contradicted as PW1 stated both accused persons were mentioned by DW1 as persons who sold him the livestock, while DW1 stated that he knew the 1<sup>st</sup> appellant as somebody who sells cows in the market and did know him by name. Another contradiction came from the evidence of PW2 where he stated that he could identify the 1<sup>st</sup> appellant by his height and voice yet he did not attend any identification parades or voice parade where the accused (1<sup>st</sup> appellant was arrested).
46. The 1<sup>st</sup> appellant further submitted that the trial magistrate erred in law and fact by convicting him based on visual and voice identity when circumstances under which the same procured created reasonable doubt as to whether he was positively identified. He further stated that it was wrong



for PW2 who identified him in the cells yet he had never met with PW2 before and there was no identification parade conducted.

47. Finally the 1<sup>st</sup> appellant stated that key and crucial witnesses were not availed in court and that his case was poorly investigated. He stated that DW1 and DW2 who were in possession of the allegedly stolen animals were acquitted. The trial magistrate could not have sensed that they were lying and had intent to fix him and the magistrate reasoning was very poor. Further there was need to bring on Kamwende before court to clarify who were the rightful owner of the animals in question.
48. The final issue raised by the 1<sup>st</sup> appellant was that this court ought to intervene and set aside the harsh and excessive sentence death sentence imposed and in its place impose a less severe sentence. He prayed that this appeal be allowed, the conviction be quashed and sentence set aside.
49. The 2<sup>nd</sup> appellant submission was filed by his advocate Ikahu Ngangah Advocate who stated that the key witness was PW2 and his evidence was doubtful and full of contradiction. In particular he stated that the commencement of the dispute was relationship between the deceased and a girl not named. This girl was not called by the prosecution to establish the truth. It was also not clear if the deceased had been killed by the first lot of youths or the second lot of youth.
50. The metal rod used to hit and kill the deceased was not brought forth and produced in court nor was it subjected to forensic dusting to establish if the two (2) convicted persons handled the same. PW2 also stated that they spent one (1) hour discussing but did not explain what they were discussing. Was it about the relationship or otherwise?
51. The 2<sup>nd</sup> appellant also raised the issue of an identification parade not being carried out and this was fatal to the prosecution case as PW2 had stated that they had been attacked by four (4) youth and their age and special features was not established.
52. The 2<sup>nd</sup> accused also faulted the magistrate for relying on facts which were not corroborated either by documented evidence or otherwise especially taking into account that there were facts of co-accused accusing each other and the PW2 was previously a suspect.
53. The final issue raised by the 2<sup>nd</sup> appellant was that the ingredient of robbery with violence a set out in the case of Jonathan Ndungu –vs- Republic CR. Appeal No 116/95 was not met. In particular the faulted the prosecution for failing to produce the dangerous weapon, the metal rod, the company of others was not proved as there was no identification parade and finally it was not proven that the 2<sup>nd</sup> appellant killed the victim. The 2<sup>nd</sup> appellant prayed that his appeal be allowed and convicting and sentence be set aside.

#### **Prosecution Submissions.**

54. The state filed their submissions and stated that they had proven the ingredient of robbery with violence as defined in the case of *Jonathan Ndungu v Republic* CR Appeal 116/95.
55. The state submitted that the three key ingredients of the charge were fully proved in evidence especially by PW2, the evidence of accused 1 and 2 as to who sold to them the stolen animals. PW7 Dr. Ndirangu Karomo also performed the post mortem on the deceased Pius Murimi.
56. The state also submitted that the identification was safe as the appellants convictions was based both on identification and recognition and prayed that the appeal against conviction be dismissed.
57. On the final issue of sentencing, the state relied on the case of *Ogolla Owuor v Republic* (1954) EACA 270 when it was stated that the appellant court should not alter a sentencing unless the trial Judge cited on the wrong principle or overlooked some material factors. Further the court should also look



at circumstances surrounding the commission of the offence and its victim. Looked at in totality the state submitted that the appellants should be re-sentenced to death penalty as there was a fatal injury arising from the heinous crime they committed.

### **Analysis and Determination**

58. This being the first appeal, this court is as a matter of law enjoined to analyze and re-evaluate a fresh all the evidence adduced before the lower court and to draw its own conclusion while bearing in mind that it neither saw nor heard any of the witnesses. See *Okeno v Republic* (1072) EA 32 where the court of appeal set out the duties of the first appellant court as follows;

“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to fresh and exhaustive examination (*Pandya v Republic* (1957) EA 336) and the appellant court own decision on the evidence made. The 1<sup>st</sup> appellant court must itself weigh conflicting evidence and draw its own conclusion (*Shantital M Ruwala v Republic* (1957) EA 570). It is not the function of a first appellant court merely to scrutinize the evidence to see if there was some evidence to support the lower court and collect finding and conclusion. It must make its own finding and draw its own conclusion. Only then can it be decided whether the magistrate findings should be supported. In doing so it should make allowance for the fact the trial court has had the advantages of hearing and seeing witnesses. See *Peters versus Sunday Post* (1958) EA 424.”

59. In line with the foregoing this court in determining this appeal should satisfy itself that the ingredients of the offence of robbery with violence were proved and as so required, beyond any reasonable doubt.

60. The key ingredients of the offence of robbery with violence and attempted robbery with violence were stated in the case of *Johanan Ndungu v Republic* CR Appeal 116/95 that;

“In order to appreciate properly as to what constituted on offences under section 296(2) of the penal code, one must consider the sub section in conjunction with section 295 of the penal code. The essential ingredients of robbery under section 295 in case of or threat to use actual violence against any person or property at or immediately after to further in any manner the act of stealing. Thereafter, the existence of the afore described ingredients constituting any robbery are pre supposed in three set of circumstances prescribed in section 296(2) any of which if proven will constitute the offence under the subsection.”

61. Ingredients constituting robbery are;

- a. If the offender is armed with any dangerous or offensive weapon or instrument.
- b. If he is in the company of one or more other person or persons.
- c. At or immediately before or immediately after, the time of the robbery he wounds, beats, sticks or uses any other violence to any person.

62. The use of the words ‘or’ implies that proof of any of the three elements is sufficient to establish the offence of robbery with violence as was stated in the case of *Dima Denge Dima and others v Republic* Criminal appeal No 300 of 2007.

“The elements of the offence under section 296(2) are three in number and they are to be read not conjunctively, but disjunctively one element in sufficient to find an offence of robbery with violence.”



63. In *Mueni Ngombau Maina v Republic* (2006)eKLR the word “robbery” was defined as follows;

“The word robbed is a term of court and connotes simply not theft but a theft preceded, accompanied and followed by use of threat or use of actual violence to any person or property or another to obtain or retain the stolen property.”

64. This court will proceed to analyze the grounds of appeal vis a viz law as to what constitute the offence of robbery with violence. While both appellants did file separate petition of appeal, the grounds both raised and similarly I would reduce the issues for determination by the court to the following;

- a. Was the visual identification by PW2 doubtful and questionable and/or was the conviction of both the appellant based on both identification and recognition?
- b. Did the deemed trial magistrate erred in law by convicting appellants based on evidence full of contradiction, hearsay and inconsistencies?
- c. Did the learned trial magistrate erred in law by convicted the appellants based on circumstances evidence without corroboration?
- d. Did the learned trial magistrate erred in law and facts by failing to consider the evidence of the appellant and thereby totally arriving at an erroneous finding?
- e. That in the alternative was the sentence handed down harsh and excessive and in this place it be substituted with a less severe sentence.

**Was the visual identification by PW2 doubtful and questionable and/or was the conviction of both appellants based on both identification and recognition.**

65. PW1 Samwel Kinuthia Nganga was not at the scene of crime and was called by his neighbour and told that his farm had been raided and animals stolen. He testified that his worker Moses Kago Karanja told him he could identify some of the people who stole the animals. PW1 further stated that where they recovered some of the stolen cows and pigs (at the home of Gicovi Gachea alias Jay Jay and Jane Kaari Igeta) the said persons who were accused 1 and 2 at the trial told them that it is “Tony, Kamwana and Wanjohi” who took the cows to his home. In cross examination he reiterated that;

“I spoke with Kagi on phone at 1.00am and he said he could identify those people who had been to my home at night that he knew them.”

66. PW2 Moses Kagi Karanja testified that on the night 30/9/2015 at about 10.00pm the herds boy came and told him that some youth had come to the farm and were alleging that he was spoiling his girl. They were 3 of them. They decided to report this incident to mama Kinya their neighbour while still at the neighbours then they saw the youth came back and they left the neighbour to go see what they wanted.

67. The youth were four (4) in number and they spoke for a while when one of them grabbed him by the neck and he was placed on the ground by two people. He further stated that his fellow workers ran away while screaming and was persued by two other assailants.

68. At regards identification PW2 stated that;

“It was not dark. I can remember I saw 3<sup>rd</sup> and 4<sup>th</sup> accused. 3<sup>rd</sup> accused was the one who neck-checked me and the 4<sup>th</sup> accused is the one who chased the herds boy with others”



He further stated that he did not see the 1<sup>st</sup> and 2<sup>nd</sup> accused (at trial) at the scene and did not attend any identification parade but was able to identify the 1<sup>st</sup> appellant when he was arrested.

69. On cross examination by the 1<sup>st</sup> appellant PW2 stated that in his statement to the police he confirmed he could identify some of the assailants and gave a description on how the 1<sup>st</sup> appellant appeared. He stated that the 1<sup>st</sup> appellant “You were the tallest”. He further stated that (with respect to the 1<sup>st</sup> appellant). “You are the one who grabbed me by the neck. There was a moonlight. I was able to identify you by your height. It was a special mark. I can identify the two men who were stealing the pigs. I can identify those who broke into the cow shed while on the ground I could partly see what was happening. I was able to identify you by height and because we spoke for long I was able to identify you upon arrest. I was also a suspect. I was not forced to record my statement so that I can be released”.

70. As regards the 2<sup>nd</sup> appellant PW2 stated that “I don’t know you but I saw you on the night when Nganga’s animal were stolen. I spoke with you at the gate of Nganga. I have told court the truth. I was able to identify you as brown. There was moonlight and I was able to identify you because we spoke for long. I was able to identify you by appearance. It is a lie that you were framed on the charges before court”.

71. In re-examination PW2 stated that;

“I saw the pigs being stolen. I also saw cows being removed one by one. I spoke with 3<sup>rd</sup> accused for about one hour and I was able to recognize him. He was tall in his appearance. I also recognized his voice. There was moonlight on that day. I could see from far. I could see them even from the home of mama Kinya which is some distance away. I was not forced to record my statement. I was with the 4<sup>th</sup> accused for long about an hour. They even asked for water to drink which we gave. He was the only one who was brown. I also recognize his appearance. The 4<sup>th</sup> accused was amongst those who were stealing the animals.”

72. PW2 was later recalled and cross examined by the appellant advocate he maintained his testimony that his worker Dennis was called to the gate and he went with him to attend to the people who called him. The people who called him were outside the gate specifically he reiterated that;

“I found 3 people at the gate. I spoke with them for about one hour. They left the scene. There was moonlight and I was able to see the person who came to the scene. 1<sup>st</sup> and 2<sup>nd</sup> accused were not at the scene. I first saw 1<sup>st</sup> and 2<sup>nd</sup> accused person at the police cells. The people returned at about 11.00pm and they were now four (4) people. We went and informed neighbours. I met the 4 again when they returned and I spoke with them with Dennis. I spoke with them while outside the gate. We had opened the minor gate. I was then grabbed by the neck. I was able to identify the people who came to the scene. Nganga lost 5 cows but I cannot tell how many pigs were stolen but I saw pigs being taken from their shade.”

73. PW2 was again cross examined by the 2<sup>nd</sup> appellant again and maintained that he gave the police description of the attackers. He identified the attackers as one tall and the other short. He repeated that

“I was able to identify you by appearance as you did not have any cap. There was also moonlight. You were brown. I said that you were short.

In my statement I did not say there was a brown suspect. I spoke with you at a distance and I gave you water to drink. There were no torch or electricity. I only identified you using



moonlight. I saw you driving away the cows. You were about on meter away. I was down at the gate as you passed with the cows”. “You are the only brown person amongst the 4 who attacked us. I also identified you by appearance.”

74. PW2 was consisted in re-examination and maintained the two appellant took active part/role. In the robbery and since they had talked earlier and later when he came back (4 people) for about one hour and the moonlight was strong enough to enable him identify them. He reiterated that;

“I was able to identify the 3<sup>rd</sup> accused by his height and conversation. He was the one who talked to me. It’s the 3<sup>rd</sup> accused who attacked me. The animals were taken out by the other 3. 4<sup>th</sup> accused was amongst three who took the cows”.

75. PW3 Esther Wanja Wachira did not witness the robbery but stated that PW2 and one Pius had gone to report to her that certain youth had come to the home of Nganga and warned Pius to leave also the daughter of Karamu. She asked PW4 if he knew the youth and he replied that he could identify one of them. In cross examination by both appellant she confirmed that PW2 had stated that he could only identify one youth who looked familiar and that two were tall and one was short.

76. PW6 Sgt Joseph Nganga was one of the first emergency respondent to arrive at the scene and alerted his seniors about what had transpired on 2/10/2015. He led a team of police officers to the home of the 1<sup>st</sup> and 2<sup>nd</sup> accused and recovered part of the stolen animals. The 1<sup>st</sup> accused confessed to have bought the livestock from Tony, Kamwana and Wanjohi. In cross examination he stated that there were no document availed for the sale of livestock and further the public did not give him description of the assailants.

77. PW8 Cpl Christopher Oroko who was also the investigating officer stated that during interrogation of PW2 Moses Kagwe who was under arrest he stated that he could identify some of the suspects. On the night of 6/10/2015 a man was arrested and brought in the cells whereby PW2 called the witness and told him that the person who has attacked him had been arrested and he was in the cells. PW8 went to the cells where PW2 identified the 1<sup>st</sup> appellant because of this positive identification and because the 1<sup>st</sup> accused had identified both appellant, as the person’s who sold him the livestock, he charged all the four of them with the offence before court. He further stated that there was no need to conduct an identification parade as PW2 had identified the 1<sup>st</sup> appellant in custody. The 4<sup>th</sup> accused (2<sup>nd</sup> appellant) was charged because he was identified by the 1<sup>st</sup> accused as one of the people who sold the cows and pigs.

78. During cross examination by the 1<sup>st</sup> appellant PW8 stated that PW2 Moses Kagi had stated that he could identify some of the perpetrators of the crime but did not know their names. Further he testified that;

“He had seen you earlier before you were brought under arrest. Moses Kagwe was able to identify you. We didn’t do any identification parade for you as he had already seen you and he indicates that you were in the cells. I didn’t do any parade for height or speeches for you.”

79. As regard the 2<sup>nd</sup> appellant PW8 stated that he was arrested on the strength of the evidence of accused 1 who knew him and identified him as the person who sold him the stolen livestock.

80. DW1 Gichovi Gachae stated that on 1/10/2015 he was at butchery when the appellant offered to sell him cows. He stated that the appellants told him that they were on the way to Embu to sell the cows and their motor vehicle head broken down and offered to sell the animals to enable them repair the motor vehicle. He bought 4 cows for a total of Kshs 185,000/-. The appellant were with a third person



known as Kamwende' upon paying for the cows he requests the appellant to help him escort the cows to his home which was not far away.

81. On 2/10/2015 he and his wife were arrested and informed the policemen who had sold him the cows on cross examination by the 1<sup>st</sup> appellant he reiterated that he 1<sup>st</sup> appellant was amongst the persons who sold him the cows and he paid Kh.185,000/- for the same though there was no written agreement as he knew the 1<sup>st</sup> appellant as a livestock dealer.
82. On further cross examination by the 2<sup>nd</sup> appellant he confirmed that he too was with the 1<sup>st</sup> appellant when they sold him the cows and that he was telling the court the truth. They did not write down an agreement as the same was not done within the livestock market where a permit would be issued and payment receipt made.
83. DW2 Jane Kaari Ngata stated that she was away selling capsicum in Nairobi and when she came back on 2/10/2015, she found new cows in her home and was told by her husband that he bought the same from Tony and Wanjohi but was not present during the transaction.
84. As was held in Charles O Matanyi versu Republic, it is necessary to test the evidence of a single witness respecting to identification and absence of collaboration should be treated with great care. In Kariuki Njiru and 7 others v Republic the court held that evidence relating to identification must be scrutinized and should only be accepted and acted upon if its court is satisfied that he identification is positive and free from possibilities and error.
85. To determine whether identification is truthful, that is not deliberately false, the court must evaluate the believability of a witness who made the identification. In doing so the court may consider the various factors for evaluating the believability of a witness testimony whether it is accurate, is not a honest mistake, witness intelligence, capacity for observation, reasoning and memory. Further, the accuracy of a witness testimony identifying a person also depends on the opportunity the witness had to observe and remember that person and whether the victim knew the accused before.
86. In various decisions, it has also been observed that while testing identification evidence of a single witness, great care and caution should be taken to ascertain whether the surrounding circumstances favoured a proper identification. In evaluation, the accuracy of identification testimony the court should consider the following factors;
  - a. Whether the lighting condition under which the witness made his/her observation.
  - b. What was the distance between the witness and perpetrator?
  - c. Did the witness have undistracted view of the perpetrator?
  - d. Did the witness have an opportunity to see and remember the facial features, body size, hair, skin colour and clothing of the perpetrators?
  - e. For what period of time did the witness actually observe the perpetrator?
  - f. During that time, in what direction were the witness and the perpetrator facing, where was the witness's attention directed?
  - g. Did the witness have a particular reason to look at and remember the perpetrator?
  - h. Did the perpetrator have distinctive features that a witness would likely to notice and remember?



- i. Did the witness have an opportunity to give a description of the perpetrator? If so. What extend did it match or not match the accused as the court finds the accused appearance to have been on the day in question?
  - j. What was the mental, physical and emotional state of the witness before, during and after the observation?
  - k. To what extent, if any did the condition affect the witness ability to observe and accurately remember the perpetrator?
87. The court of appeal in *Toroka v Republic* had this to say with regard to demeanors of a witness
- “it is possible for witness to believe quite genuinely that he had been attacked by someone he knows, yet be mistaken, so the error or mistake may still be there whether it be a case of recognition or identification.”
88. The above proposition have been held with courts emphasizing that evidence of identification/ recognition must be absolutely watertight to justify conviction. See *Wamunga v Republic* (1989) KLR 426, *Nzoro v Republic* (1991) KAR 212, *Kiari v Republic* (1984) KLR 739 and *Republic v Turnbull and others* (1973) ALL ER 549.
89. Specifically in *Republic v Turnbull and others* (1973) 3 All ER 549 as regard recognition, the court stated that;
- “...Recognition maybe more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”
90. In this appeal, this court takes judicial notice of the fact that both appellant were identified by PW2 and they were also recognized by accused 1 at trial (Mr Gichovi Gachau) who knew them well and informed the police on recovery mission that it is the two appellants and one Kamwende who sold him the stolen cows.
91. This court has gone at length to recap the evidence of PW2 Moses Kega Karunga (from paragraph 62 – 69) and specifically brought forth his testimony under oath regarding how he identified both the appellants to be part of the robber’s who attacked him and his colleague at the home of PW1.
92. Having reviewed the evidence in totality especially the evidence of PW2, PW3 and PW4 if it is confirmed that there was enough moonlight to enable the perpetrator be identified, PW2 was with the perpetrator from a period of over one hour when he had unobstructed view and enough time to see/ pick up and remember the facial features, body size and skin colour.
93. Further the attack was not immediate as the parties had met earlier on the said night of attack when the assailants came before and the parties engaged in a conversation before the assault and robbery took place. During the robbery it is the 1<sup>st</sup> appellant who grabbed PW2 by his neck and pinned him down next to the gate while his colleagues chased after and fatally assaulted PW2 colleague ‘Pius’.
94. While pinned down next to the gate, PW2 hands and mouth were tied but not his eyes. He clearly saw what was transpiring which occurred over a period of time. He had unobstructed view and saw the 2<sup>nd</sup> appellant to be part of the team leading the animals into the lorry/canter hired to ferry them away.
95. It is also importance to note that even before the robbery incident PW2 and he deceased had gone to their neighbour and reported the threats received and PW3 confirmed that PW2 told her he could



identify one of the youth. Indeed after the incident PW2 maintained and told all involved that he could identify some of the assailants. Finally when the 1<sup>st</sup> appellant was arrested and placed in the cells where coincidentally PW2 was (having been detained while the matter was being investigated). PW2 did not hesitate to report to the investigating officer that indeed the 1<sup>st</sup> appellant was one of the robbers who attacked them on the night of 30/9/2015 into 1/10/2015.

96. PW2 was also very particular that having spent over one hour with the appellants, he did describe the 1<sup>st</sup> appellant as tall and also recognized him by his voice since they spoke for long and secondly described the 2<sup>nd</sup> appellant as short and brown. He was the only brown skinned amongst the robbers and PW2 was sure as he had even given him drinking water while they were still discussing the alleged “affair with Karema daughter” before the attack.
97. To corroborate PW2 evidence, accused 1 Gichovi Gachea also informed the police who sold to him cows which turned to have been stolen. He knew both appellant’s by name. There was a case of recognition. In cross examination he confirmed he knew both appellants from the livestock market. In particulars knew the 1<sup>st</sup> appellant as livestock dealer. He also confirmed that he knew the 2<sup>nd</sup> appellant very well as he used to see him with the lorry/canter and further ascertained that both appellants were together when they offered to sell him the cows which he bought for Kshs 185,000/-.
98. Based on the evaluation of the evidence adduced, it was safe to convict both appellants as there was both direct and indirect evidence placing them at the scene of crime and selling the animals the following day. This ground of appeal thus fails.

**Did the learned magistrate erred in law by convicting the appellants based on evidence which was full of contradiction, hearsay and inconsistencies?**

99. The 1<sup>st</sup> appellant stated that PW2 evidence as regards who took the animals to the 1<sup>st</sup> accused persons home was hearsay as no witness statement was recorded of such nor was there evidence (witness testimony) over the same. Further no receipts or agreement to prove the sale was submitted which was fatal to the prosecution case.
100. Secondly, the 1<sup>st</sup> appellant, submitted that testimony of PW1 and accused 1 was contradicting especially on the issue of the pigs (who owned them??). PW1 also stated that the 1<sup>st</sup> accused referred to both appellants by name and confirmed that it was accused 1, who had informed him of their names. But accused 1 in cross examination also stated that he did not know the name of the 1<sup>st</sup> appellant’s but knew the accused as someone who sells cows in the market. He didn’t say he knew the accused by names. This shows PW1, PW2 and DW2 wanted to fix the 1<sup>st</sup> appellant.
101. The final contradiction was on identification which the PW2 confirmed that he could identify him by his height and voice as a special mark but also confirmed that he did not attend any identification parade for that purpose.
102. The 2<sup>nd</sup> appellant stated that the evidence presented was doubtful and contradicting in that; it was not clear if the dispute was in relation to the girl (not named and not called as a witness) and/or if it was the first group of 3 youth as 2<sup>nd</sup> group who committed the robbery and killed one person. The witnesses also did not state what they were discussing for one hour.
103. In *Tayab v Kinauri* (1983)KLR 114. It was held that the appellant court will not interfere with a trial court. Finding of facts based on assessment of the credibility and demeanor of a witness who gave evidence unless it was wrong in principle.



104. In *Dickson Elian Nsamba Shapwata and another v Republic* CR Appeal No 92 of 2007 the court of appeal of Tanzania states that

“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 whether they go to the root of the matter.?”

105. Also In *Phillip Nzakau Watu v Republic* (2016) eKLR court of appeal stated that;

“However it must be remembered that when it comes to human recollections no two witnesses recall exactly the same thing to the minutes detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decision of this court, some inconsistencies in evidence may signify veracity and honesty just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”

106. The inconsistencies and contradict raised by both appellant are minor and are picked to isolation from the rest of the overall evidence as presented. Both the appellant were known to accused 1 and there was no contradiction in his evidence and the evidence of PW1 as regards their identity.

107. There was also no need for an identification parade to be conducted as PW2 also, immediately recognized the 1<sup>st</sup> appellant when he was arrested and placed in the same holding cell. PW2 did not hesitate to call the sentry and requested to see PW8 whom he informed that the 1<sup>st</sup> appellant was one of the person who robbed them.

108. The contradiction as to who owns the pigs as between PW1 and accused 1 were minor contradictions not touching as the main substance of the charges of robbery with violence given that 4 cows were found in accused 1 home and which were sold to him by the appellants.

109. The 2<sup>nd</sup> appellant issues raised on contradiction were irrelevant to the charge of robbery with violence. It was not necessary for the prosecution to call the “unknown girl” to testify nor was there doubt as to the fact the same group of youth came back with an extra person and were 4 in number while executing the robbery.

110. In sum, the issues raised as hearsay, inconsistency and contradiction are minor and do not affect the root of the matter before court.

**Did the trial magistrate erred in law by convicting the appellants based on circumstantial evidence without corroboration?**

111. The judgement of the trial court was partially based on circumstantial evidence which was fully corroborated by evidence of PW1, PW2 PW3 PW4 and PW5. All the 5 witnesses confirmed that a robbery with violence incident had occurred, livestock was stolen and a fatal injury occurred.

112. It was uncontroverted evidence that PW2 identified both the appellants to have participated in the crime and later recognized 1<sup>st</sup> appellant when coincidentally place in one cell at Wanguru police station. This evidence looked at together with other circumstances evidence as both appellants having



possession and sold to the 1<sup>st</sup> accused the said stolen cows and pigs leads to only one conclusion that are inculpatory with the innocence of the accused.

113. In *Sawa v Republic* KLR 364 the court of appeal held that

“in order to justify on circumstantial evidence, the inference of guilt, the inculpatory fact, must be incompatible with the innocence of the accused and incapable of explanation upon any reasonable hypothesis than that of his guilt, circumstantial evidence can be a basis of conviction only if there are no other existing circumstances weakening the chain of circumstances relied on. The burden of proving facts which justify the drawing of the inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.”

114. In *Abanga alias Onyanggo Rep* CR No 32 of 1990 (LR) that Court of Appeal stated that;

“It is settled that when a case entirely rests on circumstantial evidence, such evidence must satisfy three tests;

- i. The circumstances from which an inference of guilt is sought to be drawn must be cogent and firmly established.
- ii. The circumstances should be of a definite tendency unerringly pointing towards guilt of the accused.
- iii. The circumstances taken accumulatively should form a chain to complete that there is an escape from the conclusion that within all human probability the crime was committed by the accused and none other.”

115. In *Téper v Republic* (1952) AL 480 it was held that ;

“It was also necessary before drawing the inference of the accused guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

116. Having reviewed all evidence that court does not find any merit or this ground of appeal as the prosecution firmly and cogently established both appellant guilt and the circumstances of this case where accumulatively considered formed a complete chain and an inescapable conclusion that both appellant actively participate in the robbery.

**Did the learned trial magistrate erred in law and facts by failing to consider the evidence of the appellant, thereby convening at an erroneous finding.**

117. The learned magistrate on page 11- 12 of his considered judgement did consider the appellants defence evidence as presented and proceed to analyze the same at page 16 of the said judgment where he stated that;

“The last issue to consider is whether any doubts have been created by the defence which can be exercised in favour of accused 3 and accused 4. The accused persons did cross examine the prosecution witnesses on their evidence before court and also cross examined accused 1 and accused 2 on evidence against them. Their evidence was not shaken. PW2 clearly stated that he saw A3 and A4 as they raised the issue of the deceased dating with the daughter. He



served them with drinking water and thereafter had ample opportunity to recognize accused 3 and accused 4 at the scene. He further stated that earlier in the day he had seen A3 washing his motorcycle before he came to their home that night. The evidence combines with the evidence of A1 makes me find that no doubts have been created by the defence by A3 and A4. I therefore find that the charge of robbery with violence has been proved to the required standard. They can be convicted under section 215 of Criminal Procedural Code.”

118. From the record it is clear that magistrate took time to analyze the appellant defence and gave reason why the defence proffered did not shake the prosecution evidence.

**Was the sentence harsh and excessive and should this court intervene and impose a less severe sentence (Death sentence imposed was it illegal or inappropriate)**

119. The penal code prescribed death sentence for the offence of robbery with violence. The trial court correctly imposed the sentence provided for in law. It was argued by the appellant the death sentence was harsh and excessive and this court should intervene and impose a less severe sentence. This argument was in line with the celebrated case of *Francis Karioko Muruatati and another v Republic* (2017) eKLR, when the court held that the mandatory nature of death sentence in section 204 of the Penal Code was inconsistent with *the Constitution* and further held that the court has discretion to impose a sentence other than death in accordance with circumstance of the case.
120. In *James Kariuki Wagena v Republic* (2018) eKLR Prof Ngugi Judge observed that while the death penalty in the maximum penalty provides for both murder and robbery with violence, the court had discretion to impose any other penalty that it deemed fit and just in the circumstances. It further observed that death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder. The judge noted that while force had been used in the case before him, it could not be said that the appellant used excessive force, nor did he unnecessarily harm the complainant during the robbery and was not armed during the robbery. He therefore reduced the appellant’s sentence of death to imprisonment for fifteen years from the date of conviction.
121. In this case before me, all the ingredients of robbery with violence have been met. Both appellants in company of others violating robbery the complainant of his livestock and in the course of the robbery were armed with dangerous weapons which they used with vicious force resulting into the death of one Pius Murimi.
122. The nature of robbery and level of violence unleashed on PW2 and the late Pius Murimi was sufficiently serious to warrant the death penalty and/or long term imprisonments as the deceased was brutally murdered in cold blood.
123. I note that the trial court did not exercise its discretion on sentencing and that might have been purely on ground that by January 2018, *Francis Kariko Muruetetu (supra)* had just been delivered by the supreme court on December 14, 2017 and the proper sentencing guidelines had not been developed. Further jurisprudence on how to handle maximum sentence in robbery with violence appeal too had not been established.
124. In the circumstance of this case, I do find that, due to the extreme violence used where one Pius Murimi died and the complainant livestock was stolen, a strong and deterrent sentence must be the only option if not the death sentence as earlier melted out. I do reduce the death sentence to a term of imprisonment for 35 years for each appellant from the date the appellants were first arraigned in court that is on 5/10/2015 in compliance with Section 333(2) of the *Criminal Procedure Code*.
125. For avoidance of doubt both appellant appeal as against conviction is dismissed.



DATED SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS ON THIS 2<sup>ND</sup> DAY OF MARCH 2023.

FRANCIS RAYOLA

JUDGE

In the presence of

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