REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION- MILIMANI COURT

CRIMINAL APPEAL NO.156 & 157 OF 2017

(Consolidated)

PETER KARANJA RUCHUI.....1st APPELLANT

NICHOLAS OUMA MKENI.....2nd APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the original conviction and sentence

in Criminal Case No. 5641 of 2014 at Chief Magistrates Court

Kibera Law Courts by Hon. Juma) – SPM on 23/10/2017)

JUDGMENT

1. **Peter Karanja Ruchui,** the 1st Appellant and **Nicholas Ouma Mkeni,** the 2nd Appellant, were charged jointly with others with **offences as follows:**

Count 1- Robbery with violence contrary to **Section 295** as read with **section 296(2**) of the Penal Code. Particulars of the offence being that on the 17th day of November, 2014, at Mericho road in Ongata Rongai Township within Kajiado County, jointly with others not before court while armed with dangerous weapons namely AK 47 rifle, homemade guns, and swords robbed Ibrahim Edwin Betty of motor vehicle, Reg. No. KBN 052 J Toyota NZE white in colour valued at seven hundred and sixty thousand (Ksh.760,000/-) and immediately before the act, threatened to injure the said Ibrahim Edwin Betty.

Count 2- Burglary contrary to section 304(1) (b) as read with **section 302(2)** of the penal code. Particulars being that on the 12th day of December,2014, at Olerai area in Ongata Rongai Township within Kajiado County, jointly with others not before court broke and entered the dwelling house of Joshua Karanja Oyende with intent to steal and did steal from therein: one fridge make LG, one television (TV) make LG flatiron, one 13 kgs gas cylinder, one 13Kgs gas burner make Ramtons, one vacuum cleaner make Sharp, one lotion spray, one wall clock make WBL, one camera make Panasonic, and one Gotv remote control, all valued at Ksh 51,000/- the property of Joshua Karanja Oyende.

In the alternative to Count 2, handling stolen goods contrary to **section 322 (1)** of the Penal Code. Particulars being that on the 14th day of 2014 at Olerei area in Ongata Rongai township within Kajiado county, otherwise than in the course of stealing dishonestly retained one fridge make LG, one TV Flatiron, one 13 Kgs gas cylinder, one 13Kgs gas burner make Ramtons one vacuum cleaner mke Sharp, one lotion spray, one wall clock make WBL, one camera make Panasonic, and one Gotv remote control, two rolls tissue papers and AV cables for GOTV knowing them to be stolen goods.

In Count 3, the 1st Appellant was charged with being in possession of suspected stolen property contrary to section 323 of the Penal Code. of the offence being that on the 14th day of December,2014, at Oleira in Ongata Rongai within Kajiado County, having been detained by No. 233383 CI George Anyonje as a result of powers conferred by Section 26 of the Criminal Procedure Code, had in his possession properties reasonably suspected to have been stolen.

Counts 4 and 5 were in respect of their Co- Accused.

In Count 6, the 2nd Appellant was accused of burglary contrary **to section 304(1) (b)** as read with **section 304 (2)** of the Penal Code. Particulars being that on the 28th day of October,2014, at Fatima North in Ongata Rongai township within Kajiado County jointly with others not before court broke and entered the dwelling house of Petica Wanjiru with intent to steal and did steal from therein: one glass ……., one mattress, one mattress, six inches, one TV mega star, one six kgs gas cylinder, TV stand, one DVD super LG, one blanket, one maasai sheet, one iron box, one water dispenser, six piece of enamel cups, hoover, and radio speakers all valued at Ksh.38,480/- being the property of the said Pretica Wanjiku.

In the alternative, he faced a charge of handling stolen goods contrary to **section 322(1)** of the Penal Code. Particulars being that on the 14th day of December,2014, at Twala shopping centre within Kajiado County, otherwise than in the course of stealing dishonestly retained one glass, one gas cylinder 6kgs, 6 pieces of enamel cups, hoover, and radio speakers having reason to believe them to be stolen goods.

In Count seven, the 2nd Appellant was charged with burglary contrary to **section 304(1) (b)** as read with **section 304 (2)** of the Penal Code. Particulars of the offence being that on the 28th day of November, 2014, at Kware area in Ongata Rongai township within Kajiado county, jointly with others not before court broke and entered the dwelling house of Jackson Atila Okutu with intent to steal therein and did steal one laptop make emachine, TV 32 inches make LG, one DVD LG, all valued at Ksh.60,000/- the property of the said Jackson Atila Okutu.

In the alternative, he was stated to have handled stolen goods contrary to **section 322(1)** of the Penal Code. Particulars being that on the 14th day of December,2014, at Twala shopping centre within Kajiado County, otherwise than in the course of stealing dishonestly retained one laptop make emachine, having reason to believe it to be stolen.

In count 8, the 2nd Appellant was stated t have been found in possession of suspected stolen property contrary to **section 323 of the Penal Code**. Particulars being that on the 14th day of December, 2014, at Twala area within Kajiado County, having been detained by No. 233383 CI George Anyonje as a result of the powers conferred by **section 26** of the criminal procedure code, had in his possession suspected stolen properties as per the attached list reasonably suspected to have been stolen.

2. The Appellants herein jointly with others were alleged to have committed a series of offences at different times. On the 28th day of October, 2014, a complainant, per the charge sheet indicated as Pretica Wanjiku, who was PW4, but the name captured as Brifilla Wanjiku Ngang'a, that I will refer to as Wanjiku, for ease of reference was away from home when her house was broken into and various household items stolen. Following the incident, she made a report to the police.

3. On the 17th day of November, 2014,PW2- Ibrahim Edwin Betty, was driving motor vehicle, registration Number KBN 052J Toyota NZE returning home with other passengers, his brother, sister and sister in law when they were ambushed by intruders as they waited for the gate to their place of residence to be opened. The four intruders had been following them in motor vehicle Registration No. KBE 001Y Mitsumbishi Pegan. One of the individuals carried a gunny bag, another was armed with a panga while the third person had a gun. They took from him assorted bank cards, registration documents and the motor vehicle without his consent.

4. On the 28th November, 2014, PW5- Jackson Atila Okutu, the complainant in count 7 was away from home when his house was broken into and various items stolen and he reported to the police.

5. On the 12th day of December, 2014, PW1-Joshua Karanja Oyende, the complainant in count 2 was away from home when the house was broken into and various household items stolen. He reported the matter to the police.

6. Following reports made and information received by informers, the police commenced investigations that culminated into the recovery of most of the items stolen from the complainants and arrest of the Appellants. An identification parade was conducted where PW1 identified the Appellants as some of the thugs he saw on the fateful night that his motor vehicle was stolen. Some of the items recovered were not identified by any of the complainants, therefore, the Appellants were charged with the offences of being in possession of suspected stolen property.

7. When put on their defence the Appellants denied the charges. The 1st Appellant who opted to give sworn evidence testified to have woken up at his place of residence, Kandisi, on the 13th December, 2014, and proceeded to Muthurwa market, his place of business. After the close of business, as he walked home he encountered a motor vehicle which stopped. It's occupants alighted and arrested him. They interrogated him and placed him in the motor vehicle that had so many items. He was taken to the police station where he was booked and placed in cells. The following day he was asked about the whereabouts of Onyancha, an individual who had been calling him on phone. He explained that Onyancha had placed an order for an 'Ohangla' CD but they continued to torture him. Thereafter he was made to call Onyancha on phone. He went to where they were purportedly to collect the CD from, only to be arrested. On return to the Police Station, he was tortured so as to make a confession but he declined. The following day he participated in an identification parade where PW2 only identified him when he had difficult in walking.

8. The 2nd Appellant gave his alias name as Muhammed, following conversion to Islamic religion. He testified that on the 11th December, 2014, while at his place of work where they prepared alcohol (chang'aa) for sale, police officers arrived so as to collect protection fee. They were offered the usual 500/- but they declined and demanded Ksh. 5000/- which he did not have. He was arrested and made to carry the equipment he was using. On their way to the AP Camp the police left him outside and entered another chang'aa 'club' this gave him the opportunity to flee. As a result, the police threatened the club owner.

9. On the 14th December, 2014, to sustain his customers, he opened his own chang'aa den. At about noon he went home to attend to his nephew only to be arrested and taken to the Police Station. At 4.00 pm he took part in the identification parade that was held where he was

identified by an individual, but denied being satisfied by the process. Thereafter he was arraigned in court.

10. The trial court considered evidence adduced and convicted both the Appellants for robbery with violence and sentenced them to suffer death as provided in law. On the 2nd count, the 1st Appellant was convicted for the main count of Burglary and sentenced to serve two (2) years imprisonment. On the 3rd count, the 1st Appellant was convicted for being in possession of suspected stolen property. The 2nd Appellant was convicted for Burglary on the 6th count and 7th count and sentenced to 2 years imprisonment on each count and on the eight count of Being in possession of suspected stolen property. Having been sentenced to suffer death on the first count, other sentences imposed were to be held in abeyance.

11. Aggrieved, the 1st Appellant appeals on grounds that he was not positively or properly identified and that the prosecution did not discharge the burden of proof as provided under the law.

12. The 2nd Appellant, based the appeal on grounds that: the evidence was full of contradictions and no caution was administered prior to conviction; the identification of the appellant at the scene and later on the identification parade was not free of error; during the first report the complainant had not identified the attackers; and the burden of proof was not discharged thereby making the conviction unsafe.

13. The appeal was canvassed by way of written and oral submissions. The 1st Appellant urged that there was need for specific description of the attackers for parade and legal purposes as held in the case of ***Sekitoleko vs Uganda (1967) EA 53*** that:

> ***"The prosecution has a duty to prove all elements of the offence beyond reasonable doubt and that the conviction of the Accused is depended upon the strength of the prosecution case and not the weakness of the defence case."***

14. He pointed out the contradiction in the description of the Appellant as purportedly given by PW2 and how he described him in court and questioned his credibility considering that he had no ability to sufficiently observe the attackers.

15. He questioned the way the identification parade was conducted and argued that it served no purpose as same members of the parade were used as held in the case ***of Joseph Mwangi Ngige & Another v Republic (2018) eklr***. He faulted the court for not finding that the mode of choice of the parade was not right as he was the only person asked to walk which he could not do following injuries sustained.

16. With regard to the 2nd ground of appeal it was his argument that evidence adduced was circumstantial and the test for such evidence as set out in the case of ***Abang'a alias Onyango v Republic Cr. Appeal No. 32 of 1990*** was not satisfied. He called upon the court to disregard confessions alleged to have been made by him regarding knowledge of the lady of the house where items were found as they were against the law.

17. In submissions filed by the 2nd Appellant in person and supplementary submissions filed by Mr. Chacha Mwita, his counsel, it was urged that the Appellants were disadvantaged for lack of legal representation that was in contravention of **Article 50(2)(g) &(h)** of the Constitution. That being charged under section 295 as read with **section 296(2)** of the Penal Code made the charge duplex hence defective as the two sections presented two distinct offences. In this regard he cited the case of ***Peter Mbuvi Wanza v Republic (2016) eklr.***

18. That PW2 having been the only eye witness, his evidence needed corroboration. Arguing that there was no proof of the robbery alleged, it was stated that there was no evidence of existence of the motor vehicle. He questioned why the complainant's relatives who were alleged to have been in the motor vehicle or even the watchman were not called to testify.

19. On the issue of identification of the appellants, it was urged that it was done in violation of the police standing orders. That there was failure to describe the alleged robbers and subsequent identification parades were stage managed so as to easily pick out the 2nd Appellant, the only person who had a wound; and that there was no proof that the house in issue had been rented by the Appellant.

20. The appeal is opposed by the Respondent /State. It is urged that the prosecution established all ingredients of the offence of robbery with violence as set out in the case *of* ***Olouch vs Republic (1985)KLR*** where the Court of Appeal stated as follows:-

> ***"…Robbery with violence is committed in any of the following circumstances:***
>
> ***The offender is armed with any dangerous and offensive weapon or instrument; or***
>
> ***The offender is in company with one or more person or persons; or***
>
> ***At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person."***

21. That the ingredients of the offence were rightfully proven as the

offenders were armed with dangerous and offensive weapons which included guns and a panga; the offender was in company of one or more persons; and violence and threats were occasioned.

22. That the complainant gave the description of the attackers and some of the documents stolen were found in the motor vehicles that the attackers had. That there was very bright light that enabled the witness to see the three assailants. And as held in the case of ***Francis Kariuki***

Njiru and Seven Others v Republic, Criminal Appeal No.6 of 2001*,* the identification was positive and free from error.

23. On the question of the offences of Burglary, it was submitted that the complainants' houses were broken into and stolen goods were recovered from the Appellants' houses within a span of one and a half months which brings in the applicability of the Doctrine of recent possession as stated in the case of ***Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs NYR Court of Appeal No. 272 of 2005*** where it was stated that:

> ***"……It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that 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…"***

24. On the defence put up, the Respondent argued that the Appellants having led the police to the recovery of the stolen goods that were positively identified by the complainant, in their defence, they failed to explain how they came into possession of the items they led the police to recover.

25. This being a first appellate court, it has a duty imposed on it by law to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing and hearing the witnesses and observing their demeanor and so the first appellate court must give allowance of the same. This was well put in the well-known case of ***Okeno V. Republic [1972] EA 32 where*** the court stated as follows**:**

> ***"The first appellate court must itself weigh conflicting evidence and draw its own conclusions (SHANTILAL M. RUWALA VS. R. (1975) EA 57). 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."***

26. What constitutes the offence of robbery with violence is well captured in the case of Oluoch (Supra). In the case of ***Dima Denge Dima & Others vs Republic,Criminal Appeal No. 300 of*** *2007*,it was stated that:

> ***"…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 is sufficient to found an offence of robbery with violence."***

27. This being the case, to secure a conviction, the Prosecution was required to prove only one of the ingredients of the offence beyond reasonable doubt. According to PW2, He saw more than one person. Two of the individuals had a gun and panga, respectively. A gun (firearm) is a device capable of causing serious bodily injury or even death, therefore it is a dangerous weapon. A panga is a tool that is made, adapted, or intended to be used as an agricultural implement but can be used to cause physical injury to a person, hence an offensive weapon. Further, he told the court that the assailants took from him a motor vehicle Registration No. KBN 052J Toyota NZE, white in

Colour, as they threatened to injure him.

28. It is argued by the 2nd Appellant that there was no proof of existence of the alleged motor vehicle and by extension the theft. In examination in chief, PW2 stated that the motor vehicle was taken as well as registration documents. It was not clear where exactly the documents were. But on concluding his testimony he stated that the vehicle was not recovered, that he had its logbook but he did not carry it to court. He also told the court that he had his bank cards for co-operative Bank, Samsung S3 white in colour, and a National Identity card that were taken from him. The charge sheet did not capture these other items as having been stolen. And on cross examination by the 1st Appellant, the complainant stated that some of his documents which were cards were recovered from the car which the robbers had and that he went and picked the cards.

29. These alleged cards do not seem to have been treated as exhibits, if indeed they existed, since the complainant did not identify them. Therefore, the only item alleged to have been stolen being the car, there was no proof of ownership and no explanation was given why its existence was not established.

30. However, in the case of ***Michael Nganga Kinyanjui v Republic (2014) eklr,*** *t*he Court of Appeal stated as follows:

> ***"…Was the complainant bound to prove that the stolen mobile phone was his? Although he was categorical that the phone was snatched from him by the appellant, the phone itself was not recovered when the appellant was arrested. Under Sections 295 and 296 of the Penal Code, there is no requirement that the thing stolen in a robbery must belong to the person from whom it was robbed. We find no merit on this ground too. …"***

31. Therefore, proving existence of the motor vehicle was inconsequential.

32. The trial magistrate has been faulted for not drawing an adverse inference following the prosecution's failure to call witnesses who were alleged to have been present at the time of the robbery. PW2 stated that he was in company of his sister, Michelle Kwikwi, and their sister-in-law had gone to open for them the gate. Then, there was a Maasai guard who was ransacked.

Section 143 of the Evidence Act provides that

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

33. ***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."

34. The issue to be considered is whether evidence adduced without the input of the stated individuals was sufficient to prove the case? In the case **of Roria v Republic [1967] EA 583**, at page 584, the Court of Appeal had this to say on identification by a single witness,

"Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

35. It was urged by the Respondent that security lights at the gate were bright which enabled the complainant (PW2) to see the assailants, and subsequently identified them on the identification parade. But, the Appellants contend that had that been the case, the Complainant would have described them to the police at the first instance.

36. In ***Nathan Kamau Mugwe vs. Republic- Criminal Appeal No. 63 of 2008*** the Court of Appeal was faced with a similar situation and it expressed itself thus:

***"As to the complaint in ground six that the witnesses had not given to the police the description of the appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in GABRIEL's case, supra, the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification. All the Court said was that the witness SHOULD be asked. That is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him*.

In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade. We reject the contention that because James had not given to the police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected."

37. The allegation of the description of the Appellants having not been given by the complainant prior to the parade being held came up at the appellate stage. Looking at what transpired at trial on cross examination by the 1st Appellant, PW2 stated that he had described him as short, dark with a wound on the right hand, slightly dark in complexion compared to his other co-accused that he identified. With regard to the 2nd Appellant on cross examination, PW2 said he described him as of dark complexion, had a fresh wound on his right hand. Therefore, the question of description of the assailants does not arise.

38. On the question of how the parade was conducted, the ***Court of Appeal in David Mwita Wanja & 2 others vs. Republic [2007] eKLR*** while emphasizing on the importance of a properly conducted identification parade delivered itself as follows:

"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 There are a myriad other decisions on various aspects of identification parades since then and we need only cite for emphasis Njihia vs. R [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."

Indeed, Police Form 156 which is designed pursuant to Force Standing Orders issued by the Commissioner of Police under section 5 of the Police Act Cap 5 Laws of Kenya and which is invariably used in the conduct of identification parades expressly provides for 16 or so requirements which ought to be observed."

39. According to the decision of R V Mwango S/O Manaa(1936) 3 EA CA 29, these must be taken into consideration:

(i) An accused should always be informed he may

have his advocate or friend when a parade takes place.

(ii) The investigating officer may be present but he or

she is not permitted to carry out the identification parade.

(iii) None of the witnesses are allowed to see the

accused before the parade.

(iv) There must be at least eight persons as far as

possible of similar age, height, general appearance and class of life.

(v) The accused may stand at any position.

(vi) Exclude every person who has no business there.

(vii) Careful notes be recorded after each witnesses

leave and if identification had been made or not.

(viii) Witnesses may ask accused to walk, speak, see

him with a hat or not, if so, then all parade members must do likewise.

(ix) The witnesses must touch the person identified.

(x) Accused to be asked if he is satisfied with the

parade at its termination.

(xi) There should be no influence. Witnesses should

be told instead you will see "a group of people who may or may not contain the suspected person". NOT "can you see the suspect in the parade?"

xii) Be fair.

40. The statement recorded by PW2 forms part of the record. He stated that he saw four (4) young men emerge from the vehicle, one had an AK47 rifle while others carried pangas. One of them had a fresh cut wound on his right hand and the other was tall, slim and slightly dark in complexion. That the other two were at a distance hence he was not able to see clearly. If, indeed he identified them, then he could only have identified two individuals.

41. Looking at the manner in which the parade was conducted, there were eight members of the parade excluding the Appellants. The eight persons appeared on all the four parades that were conducted. Both Appellants had sustained injuries at the time. For the 2nd Appellant per what the complainant stated, it was easy to pick him out because of the wound that he had as opposed to other parade members. The witness identified three persons. The question begging is what prompted him to identify the third person? The parade, as conducted cannot be said to have been done with scrupulous fairness.

42. With regard to the offences of burglary, handling stolen goods and being in possession of suspected stolen goods, stated to have been committed by both Appellants, the complainants were not at home on the fateful nights when their houses were broken into. Evidence adduced was therefore not drawn from direct observation of the fact of breaking into the houses and taking away their possessions. Evidence was however tendered of recovery of some of the items.

43. PW1 acting on information that some items were within their neighbourhood led the police to a house where some of the items were recovered. The house was alleged to be occupied by the 1st Appellant who was however not at home. Items found in the house that the complainant (PW1) identified and proved ownership were: a fridge, television set, gas cylinder and a burner, clothes. He also witnessed recovery of some other items, electronics inclusive.

44. A lady was found in that particular house that the prosecution argued was the 1st Appellant's wife. At the outset, they arrested her and while on their way to the police station they saw an individual, the 1st Appellant herein, who was allegedly identified by the lady as her husband. On seeing the police, he fled but they pursued and arrested him.

45. PW3 Terence Iswekha alluded to having called PW1 on seeing people carrying items out of a neighbor's house. To his knowledge, people who occupied the house from which PW2's items were found avoided contact with other people. Different people frequented the house such that he could not tell the man of the house, but, he knew the lady of the house and a child.

46. It is argued by the 1st Appellant that the prosecution failed to prove any relationship between him and the alleged lady who was neither treated as a witness or an accused person. Further, and, that it failed to prove ownership of the house where the items were recovered. Although the prosecution did not call evidence of the landlord to prove beyond doubt occupancy of the house, on further cross examination of PW7 No. 232952 APC Amos Pere, it was established that the lady who was under arrest was released the following day upon the 1st Appellant admitting that she was his wife.

47. Following investigations carried out, the 1st Appellant led the police to the arrest of his co- accused, (who did not appeal) Joseph Ojwang Onyango alias Onyancha, in whose house stolen items were recovered. Thereafter, they led the police to the arrest of the 2nd Appellant who contends that the police did not establish existence of such a house or the fact of the appellant having rented it. Despite the argument, in his defence the 2nd Appellant admitted having been found in his house listening to music where various items alleged to have been stolen were recovered.

48. The State is faulted for having inventories made at the police station instead of the locus in quo and having not been witnessed by independent persons. In the case of ***Stephen Kimani Robe and Others -Vs- Republic [2013] eKLR it*** *was stated that:*

> ***"The purpose of an inventory is to keep a record of exhibits recovered during the investigation. Failure to prepare an inventory cannot override the physical existence of the exhibits especially where other witnesses apart from the officer who made the recovery confirms their existence."***

49. Evidence was adduced by officers who recovered the exhibits, it was not mandatory for the inventory to be prepared, but having been done with omissions stated was not prejudicial to the prosecution's case.

50. The 2nd Appellant also complains that the charge in count 1 was duplex and defective having been stated to be contrary to Section 295 as read with Section 296(2) of the Penal Code.

Section 295 of the Penal Code provides as follows:

> ***"Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery."***

This is the section that defines the offence of robbery.

Section 296(2) of the Penal Code on the other hand provides thus:

> ***"(2) 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."***

This provision of law provides for the penalty for the offence of aggravated robbery.

51. In the case of ***Joseph Njuguna Mwaura & 2 Others vs. Republic (2013)*** a 5 Bench Court of Appeal stated thus:

> ***"We reiterate what has been stated by this Court (sic) in various cases before us: the offence of robbery with violence ought to be charged under Section 296 (2) of the Penal Code. This is the section that provides the ingredients of the offence, which are either the offender is armed with a dangerous weapon, is in the company of others, or if he uses personal violence to any person. The offence of robbery with violence is totally different from the offence defined under Section 295 of the Penal Code, which provides that any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to steal. It would not be correct to frame a charge for the offence of robbery with violence under Section 295 and 296(2) as this would amount to a duplex charge."***

52. However, the Court of Appeal in the case of ***Cherere s/o Gakuli vs. Republic (1955) 622 EA AC*** clearly stated that:

"The test still remains as to whether or not a failure of justice has occurred. In our opinion, the result of the Applications of the test must depend to some extent upon the circumstances of the case and the nature of the duplicity."

53. The question to be posed is therefore whether the Appellants were prejudiced as a result of the duplicity. When the charge was read to the Appellants, it disclosed the offence they were facing, they understood the allegations and prepared their elaborate defences. In the premises, they were not prejudiced.

54. Further, it is also argued that **Article 50(2)(g)&(h)** of the Constitution was not complied with as the Appellants were not informed of their right to representation that was prejudicial. The alluded to provision of the law provides thus:

(2) Every accused person has the right to a fair trial, which includes the right-

(g) To choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) To have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

The right to a fair trial includes an accused person being given the opportunity of deciding to seek legal representation. Time within which it should be done is not specified but it is envisaged to be at the commencent of the trial.

55. In case of ***David Njoroge Macharia vs Republic [2014] eKLR***, it was held that:

"Under the new Constitution, state funded legal representation is a right in certain instances. Article 50 (1) provides that an accused shall have an advocate assigned to him by the State and at state expense, if substantial injustice would otherwise result (emphasis added). Substantial injustice is not defined under the Constitution, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2 (6). Therefore provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory.

We are of the considered view that in addition to situations where "substantial injustice would otherwise result", persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re-trial where no such legal representation was provided.

56 In the case of ***Karisa Chengo & 2 Others V R, CR NOs. 44, 45 & 76 OF 2014,*** it was stated that:

"It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The Constitution is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result" and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise.

Again, this Court differently constituted in the case of Moses Gitonga Kimani v Republic, Meru Criminal Appeal No. 69 of 2013, recognized that the Constitution has placed an obligation on Parliament to enact legislation which would ensure realization of an accused person's right to a fair trial under Article 50 of the Constitution within four years of the promulgation of the Constitution. In that regard the court stated as follows:

"It is the envisaged legislation that would set out the circumstances and parameters under which an accused person is entitled to legal representation at the State's expense. While appreciating that the framers of the Constitution intended the right to legal representation to be achieved progressively we implore Parliament to enact the requisite legislation."

Article 261 of the **Constitution** provides inter alia:-

(i) Parliament shall enact any legislation required by this Constitution to be enacted to govern a particular matter within the period specified in the Fifth Schedule, commencing on the effective date.

(ii) Despite clause (1), the National Assembly may, by

resolution supported by the votes of at least two-thirds of all members of the National Assembly, extend the period prescribed in respect of any particular matter under clause (1), by a period not exceeding one year.

It is therefore apparent that the provisions of Article 261 and the Fifth Schedule to the Constitution, that would give effect to the provisions of Article 50, including Article 50(2)(h), are to be implemented within a period of between 4 and 5 years. We must

however lament the obvious lack of the appropriate legislation almost five years after the promulgation of the Constitution to provide guidelines on legal representation at State's expense. We believe time is now ripe and nigh for the enactment of such legislation. That right cannot be aspirational and merely speculative. It is a right that has crystalized and which the State must strive to achieve. We say so while alive to the fact that right to fair trial is one of the rights that cannot be limited under Article 25 of the Constitution."

57. The right to legal representation at the State expense was to be achieved in stages. Consequent to the provision of the law, Parliament did enact legislation that set parameters under which an accused person is entitled to legal representation at the State expense.

58. The Legal Aid Act (Act) is an Act of Parliament that was enacted to give effect to **Articles 50 (2) (g) and (h)** of the Constitution to facilitate access to justice and social justice; to provide for legal aid, and for the funding of legal aid. According to the Act, legal aid includes legal representation. In order for the State to provide for legal services one must qualify. **(See section 35). Section 36** of the Act provides thus:

1) A person is eligible to receive legal aid services if that person is

indigent, resident in Kenya and is—

(a) A citizen of Kenya

(b) A child;

(c) A refugee under the Refugees Act;

(d) A victim of human trafficking; or

(e) An internally displaced person; or

(f) A stateless person.

(2) A person who is eligible to receive legal aid

services under subsection (1) shall apply to the Service in the prescribed manner.

(3) A person shall not receive legal aid services unless

the Service has determined that the individual's financial resources are such that the person is eligible for the

services.

(4) Despite subsections (1), (2) and (3), the Service

shall not provide legal aid services to a person unless the Service is satisfied that —

(a) The cost of the proceedings is justifiable in the

light of the expected benefits;

b) Resources are available to meet the cost of the

legal aid services sought;

(c) It is appropriate to offer the services having regard

to the present and future demands;

(d) The nature, seriousness and importance of the

proceedings to the individual justify such expense;

(e) **The claim in respect of which legal aid is sought**

has a probability of success;

(f) The conduct of the person warrants such assistance;

(g) The proceedings relate to a matter that is of public interest;

(h) The proceedings are likely to occasion the loss of

any right or the person may suffer damages;

(i) The proceedings may involve expert cross examination of witnesses or other complexity;

(j) It is in the interest of a third party that the personbe represented;

(k) Denial of legal aid would result in substantial

injustice to the applicant; or

(1) There exists any other reasonable ground to justify the grant of legal aid.

Section 40 of the Act provides as follows:

(1) A person who wishes to receive legal aid, shall apply to the

Service in writing.

(2) Where a person wishes to apply for legal aid the

person shall apply before the final determination of the matter by a court, tribunal or any other forum to which the application relates.

(3) An application under subsection (1) shall be assessed, with respect to the applicants' eligibility for legal aid services in accordance with this Act.

59. The upshot of the above is that legal aid is not automatic, not all people receive legal aid. But, the court has the duty of explaining the position to the accused person to enable them act accordingly.

60. The Legal Aid Act commenced in 2016.In the instant case, the Appellants were arraigned in 2014, prior to enactment of the Act, therefore failure to render the necessary explanation was not prejudicial.

61. Looking at count-2 in the case of the 1st Appellant, the house was broken into on the night of 12th December, 2014, and the stolen goods were recovered two days later. For the 2nd Appellant, the items were recovered between a month and a half later. In the case ***of Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v. Republic Cr App. No. 272 of 2005(UR***

It was stated that:

"It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved.

In other words, there must be positive proof:

(i) That the property was found with the suspect;

(ii) That the property is positively the property of the complainant;

(iii) That the property was stolen from the

complainant;

(iv) 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."

62. Properties in issue were recovered in houses occupied by the Appellants. Section 4 of the Penal Code defines possession as:

> ***"be in possession of" or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person…"***

63. The items that were positively identified by the complainants were stolen.

64. The upshot of the above is that the appeal succeeds partially, the conviction on the 1st count cannot stand. The appeal on that count is allowed, the conviction is quashed and the sentence imposed is set aside. Both appellants will stand released after serving other sentences.

65. On the 2nd, 3rd 6th, 7th and 8th counts, I affirm the conviction. The sentences will be effective from the date of conviction and sentence by the trial court. For avoidance of doubt, sentences that were held in abeyance will be effective from the date of conviction and sentence by the trial court.

66. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 13TH MAY, 2021.

L .N. MUTENDE

JUDGE