



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. E001 OF 2021

BERNARD MUTISYA MUTUVA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence

by Hon. H. Onkwani, Principal Magistrate dated 21st December, 2020

in Mavoko Chief Magistrate's Court Criminal Case Number 375 of 2015)

BETWEEN

REPUBLIC.....COMPLAINANT

VERSUS

BERNARD MUTISYA MUTUVA.....ACCUSED

JUDGEMENT

1. Bernard Mutisya Mutuva (the appellant herein) and **Samson Gitau Kariuki** (the 2nd accused) were charged before the Chief Magistrate, Mavoko in CM's Court Criminal Case No. 375 of 2020 with four counts of Robbery with violence contrary to section 295 as read with Section 296(2) of the *Penal Code*. In count I, it was alleged that on the nights of 13th and 14th February, 2015 at Professor Court Estate, Syokimau Area, in Athi River Sub-County, Machakos County, they jointly with others not before Court, while armed with dangerous weapons namely rifles and pistols robbed **Hon. Philip Galma Godana**, one mobile phone make Samsung S4, one flat screen television all valued at Kshs 141,000/- the property of **Hon. Philip Galma Godana** and immediately after the time of such robbery killed **Hon. Philip Galma Godana** .

2. In count II, they were charged with a similar offence the particulars being that on the same day at the place while armed with similar weapons robbed **Balla Galma Godana** one laptop male Compaq CQ56 valued at Kshs 42,000/-, one mobile phone make LG G3 IMEI 355673068047328 valued at Kshs 70,000/-, one mobile phone make NOKIA X2-01 valued at Kshs 8,000/-, one APPLE IPOD SHUFFLE valued at Kshs 8,000/-, all valued at Kshs 128,000/- the property of **Balla Galma Godana** and immediately after the said robbery threatened to use actual violence to the said **Balla Galma Godana**. In the alternative, they were charged with Handling Stolen Goods Contrary to Section 322(1) as read with Section 322(2) of the *Penal Code*, particulars being that on the 17th day of February, 2015 at Pats Mobile Accessories and Repair Shop, Kariokor Trading Centre within Nairobi County, they, jointly otherwise in the course of stealing dishonestly assisted in the disposal of mobile make LG G3 IMEI 355673068047328, knowing or having reason to believe them (sic) to have been stolen or unlawfully obtained.

3. In Court III the duo faced a similar charge of robbery with violence the particulars being that on the same day and place as the main charges above, while similarly armed, they robbed **KULE ABDUBA IRGO** cash Kshs 10,000/-, one mobile phone make SAMSUNG S3 MINI valued at Kshs 20,000/- and one bottle of perfume valued at Kshs 40,000/- all valued at Kshs 70,000/- the property of **KULE**

ABDUBA IRGO and immediately after the said robbery threatened to use actual violence to the said **KULE ABDUBA IRGO**.

4. In Count IV, they similarly faced a charge of robbery with the violence the particulars being that at the same time at the same place while similarly armed, they robbed **ORGE GALMA GODANA**, one mobile phone SAMSUNG S4 valued at 65,000/- and one laptop make Toshiba Satellite valued at Kshs 38,000/- all valued at Kshs 103,000/- the property of **ORGE GALMA GODANA** and immediately after the said robbery threatened to use actual violence to the said **ORGE GALMA GODANA**.

5. The accused pleaded not guilty to all the said counts.

6. In support of its case, the prosecution called a total of 11 witnesses.

7. According to PW1, **Godana Orge Galma**, on the night of on 13th February, 2015 she arrived home from work at 8:00pm, had dinner with other family members who thereafter retired to sleep while she remained back, worked until 1:00am and thereafter went to sleep. Around 2:13am she was woken up by movements around the corridor. She called her sister, **Galma Godana**, PW2, and saw two men, one of whom roughed and woke her up threatening to kill her should she scream. According to the man, they had been told of millions in the house. The thugs, according to PW1, were 4 in number each of whom were armed with pistols. One of them took her phone and they ransacked the drawers on her bedside after which she was taken to the corridor as they demanded that she should show them where the millions were. Despite her telling them that they had only electronics in the house, they insisted that they wanted the millions and took her to her sister's bed.

8. She called PW2 and informed her in *Borana* that they had been attacked. The attackers, who spoke in Swahili, ransacked PW2's room while threatening to kill them with a bullet which they displayed. They then dragged PW2 but later left her and took PW1 to her parents' room holding a gun on her back. She called her father and told him in *Borana* to open the door as they had been attacked. Her parents woke up and opened the door and switched on the lights. The attackers threatened to kill their father unless he showed them where the money was. All the while, they were all lying on the floor in one room which the ransacked. One of the attackers stood in front of her father with the gun while the mother pleaded with them to take the Subaru. One of the attackers then whispered something in the ear of the one who was holding the gun and they faced towards the left. They then heard a loud bang and her father fell. According to PW1, she was seated on the right side of her father. After that the attackers left.

9. PW1 then screamed calling her brother, and they locked themselves in her father's bedroom and called the police and friends. In the meantime, they kept hearing loud bangs downstairs and after some time all went quiet. She stated that they were assisted by a doctor, **Dr Bokesse**. When the police arrived, they opened the bedroom. By then her father was bleeding on the ground. He was then taken to the Hospital but died at around 4:00 am.

10. It was her evidence that during this time the corridor lights and the lights in her sister's room were on and she saw the attackers clearly as their faces were not covered and she talked to them for about 5 minutes and observed them well. According to her they were of chocolate dark complexion and her around her height. Though they had dark muffles, their faces were visible. It was therefore her evidence that she could recognise the attackers and identified the Appellant (1st accused) as the one who was holding the gun in front of her father while the 2nd accused ransacked the house though she had not seen them prior to the attack. It was her evidence that she lost her Samsung galaxy and Toshiba laptop and family television, Samsung 40 inches.

11. In cross-examination, she stated that the robbery took place on the morning of 14th February, 2015 and she recorded her statement on 22nd February, 2015, 9 days later. According to her, her memory was still fresh. She insisted that in her statement she described to the police the attackers but this seems not to have been captured. It was her evidence that she was not present when the Appellant was arrested and did not know when he was arrested. According to her the charge sheet indicated the estimated value of what she lost. She asserted that she saw the Appellant when she was woken up though she had been woken by the sound of the movement. She however admitted that she was shocked and terrified but insisted that the attackers were not masked. Nothing was however recovered.

12. She explained that a house help and a watchman were outside the house and her brother and grandmother were sleeping downstairs. She insisted that she saw the Appellant who ransacked her room and he had a black muffin. The 2nd accused also had a pistol. She however did not see the rifle.

13. PW2, **Godana Balla Galma**, was at home on 13th February, 2015 at 10.00 pm having arrived from Nyeri. All her family members were at home and everyone went to bed save for the siblings. She however also went to bed at around 11pm leaving PW1 and her brother in the sitting room. In the middle of the night PW1 called her and informed her in *Borana* that there were thugs in the house. When she woke up, she saw the lights on and there were 4 people with PW1, all of whom had guns. The four told PW1 to sit down as the ransacked her room claiming that they had 1 million in the house. One of them removed the magazine and showed them the bullets telling them they were live bullets before returning it. The attackers then took her laptop and her phone and told her to open her father's room and told PW1 to wake up their parents. She remained in her room as PW1 went to wake up their parents but saw them heading there while holding the gun on PW1's head. After their parents opened the door one of the attackers returned and took the book she was holding and when she joined her parents she saw her mother, PW3, lying on the ground while her father and PW1 were seated down. She then told PW3 to sit down as two attackers remained at the door while the other two ransacked their father's wardrobe and the bed, while saying that they had been told that there was a million in the house. When the father said no one keeps a million in the house, one of the attackers hit her head from the back using the butt of the gun. The person who had taken her phone asked if there was money in the house and she said she had none. The attackers then returned to the door and shortly thereafter there was a very loud gun and she saw their father bleeding from the head. After their brother had been called by PW1, the brother called the police but the police took a long time to come. She went to the window and called a neighbour doctor, **Dr Bokesse** and told her that their father had been shot. She then heard another gun shot and footsteps.

14. According to PW2, the thugs had not hidden their faces and they saw them very well. Though they had ordinary masks, their faces were not covered or hooded and there was light along the corridor and on the stairs.

15. She stated that they noticed that a window had been broken and the TV was missing as well as her handbag, her phone IMEI No. 355673068047328, her laptop Compact CQ 65 and money. According to her it was the 2nd accused who took her phone and he was armed with a pistol. He was the one who asked her if there was money in the phone and she observed him well as he ransacked her room and opened her parents' drawers. He had a navy blue jumper while the Appellant, who ransacked the wardrobe in their parents' room had a red jumper and was also armed with a gun and insisted that they were told there was one million in the house. PW2 stated that she looked at him and he pointed the gun at her. She however did not see the person who hit her from behind or the person who shot their father though they were attacked by four thugs all of whom were armed.

16. In cross-examination, PW2 stated that he saw the Appellant when he went to her room and that he was the only one with a red jumper and it was him who ransacked her wardrobe and her parents' room. PW2 insisted that she gave the description of the attackers to the police as being of medium height, not thin, and that the person who displayed the bullet was either a Luo or a Luhya but was not the Appellant. She however admitted that people do resemble.

17. In answer to the questions by the 2nd accused, she stated that three of the attackers had dark jackets while the Appellant had a red jumper.

18. PW3, **Kule Abduba**, a retired trained teacher, testified that on 13th February, 2014 at 11.30pm she was in bed and he was joined by her husband at mid night and they slept. At 2am, their daughter called her father and said in *Borana* that 4 men were holding her and threatened to kill her if the parents failed to open the door. When PW3 opened the door, there was light in the corridor and she saw 4 people each holding a gun while some had spotlights with one of them holding the girl. She was told to lie down which she did and her husband came and leaned on the wall while three of the attackers entered their room. Two of them ransacked the room while the third one remained at the door. One of them said that they knew the husband had 1 million which they wanted him to produce otherwise they would kill him. PW3 told them to pick all they wanted and leave. According to her, she looked at the one holding the gun and the one who was ransacking the house who kept on insisting that they would kill them as he could not understand why they had a Subaru yet they had no money. The husband informed them that there was some money in the Mpesa but they kept on searching. After an hour the one who was had the gun and who was searching on the right side moved and talked in low tones and after they left, she heard a loud bang and saw her husband fall over PW3. After the attackers had left, she told her children to call **Dr Bokesse**. It was her evidence that the attackers took some time in the sitting room collecting some things before leaving. When the police arrived her husband was already dead and they took him away. It was then that they realised that the TV was gone together with her mobile phone, Samsung, Kshs 10,000/- her husband's phone, her personal goods, her perfume and computers. It was her evidence that the ordeal took one hour and as the attackers had only covered their hair and not their faces, she was able to see them clearly since she kept on talking to the guy who was holding the gun and asking for the one million who had a navy blue jumper with a dark trouser with sunken eyes. (Here the Court noted that the Appellant had sunken eyes). The other one who was searching the room who was close to her had a zebra jumper which he had removed and was tied on his waist.

19. PW3 identified two of the attackers in court. According to her the 2nd accused was the one who was searching the bags while the Appellant was the one holding the gun and asking for one million. The two, she stated, were the ones who conversed before leaving the room. Though she was told to lie down she looked up to see them but after a while she sat up when one of her daughters told her to do so and she was able to identify them all through as she stared at them very well. In her evidence the appellant was tall, thin and had sunken eyes and was close to her.

20. In cross-examination by the Appellant, she stated that she was not aware if PW2 gave a different version of what the Appellant was wearing but she insisted that she was telling the truth.

21. In answer to the questions by the 2nd accused, the witness stated that she had not seen the accused before save for the day of the attack and in Court. She insisted that the Appellant had navy blue jumper and a dark trouser while the 2nd accused had a red jumper on his waist. It was her evidence that nothing was recovered save for PW2's phone which she had bought in Dubai.

22. PW4, **Prof Guyo**, a family friend to the deceased was on 14th February, 2016 informed that the deceased had been attacked and was rushed to Shallom, where he went to see him. As he was driving, he was informed that he had died and he was able to identify his body in the presence of police officers for the purposes of post mortem.

23. PW5, **Cpl. James Olago**, on 14th February, 2015 at 8am in the company of fellow police officers went to a residential house in Syokimau where he was shown a pool of blood in a bedroom with several scattered items. He dusted the crime scene where he lifted some finger prints from the TV Screen. He proceeded to Shallom Hospital Mortuary where the body of the deceased was with a neck injury and processed the body. He took 23 photos of the scene showing the damaged window, blood stains, scattered items and the body. On 16th February, 2015, he took the said photos and finger print impressions for printing and analysis and certified that the same were printed under his supervision and produced the same as exhibits.

24. PW6, **Cpl. Paul Muchira**, testified that he ascertained that phone number +254789xxxxxx was in use vide IMEI No. 355670368047320 on 17th February 2015 at 9.08 am in Ngara Area, Nairobi where the mast that covered Pangani, Kariokor and Kirinyaga Road was. According to him, the subscriber received SMS from the service provider through the server. The subscriber of the line was one **Bernard Mutuva** sim card No. 78925159712378 MSISDN – 78921597, ID No. 12xxxxxx and the registration date was 14th September, 2013.

25. In cross-examination, he stated that the Airtel number paired with the handset was No. 0789xxxxxx and that it was paired with serial no. 3556730680473280. He however stated that a sim card can be operated without a pin number if the subscriber chooses to do so though a pin, which is set by the subscriber, should be inserted to activate the line. Sometimes, lines have 0000 as the pin. In this case, the handset was used on 17th February, 2015 at 0908 hours and was in the phone for less than a second, the location being Ngara, Nairobi and the phone was not used again.

26. PW7, **Cpl. Robert Kiprotich**, who was attached to DCI Mlolongo was on patrol on the night of 13th and 14th February, 2015 when, at about 3am, he received a call from the DCIO informing him that there was a robbery at Syokimau. He proceeded to the area and upon reaching the house of **Philip Godana**, at Professor Court, he found other officers at the scene. They were taken round by the guard who told them that the thugs had jumped over the wall. They established that the sitting room window grill had been cut to allow one to gain access and they used the window to open the door and to gain access and open the. They were informed some thugs were still within the house and the occupants were scared. Using a password, to identify themselves, they started searching the rooms and found things strewn all over the place. In one of the locked rooms they found the occupants, 3 females and 1 male, therein who opened for them upon them altering the password.

27. Inside, he saw blood on the floor and the deceased was lying unconscious on the floor with an injury on the neck. After the OCS and D/DCIO Mlolongo arrived, they took him to Shalom Hospital. Though they searched they house, they did not find any of the thugs. He was however informed that the attackers took away a TV, 2 laptops, 5 mobile phones and other electrical appliances. Later the scene of crime personnel went to process the scene. He however came to learn later that two people were arrested after investigations. In his evidence, there was a spent cartridge at the scene.

28. PW8, **PC Johnson Wanjohi**, who was then based at the DCI Mlolongo and one of the investigations officer in the matter, was on patrol on the night of 13th and 14th February, 2015 when the OCS called him and informed him that there was a robbery incident at Professor's Court at Syokimau. Upon rushing there in the company of **Cpl Kiprotich** and driver, **Rotich**, they found a guard who informed them that the robbers were armed and were still there. According to the witness, the house was locked but a window grill had been cut. Some officers entered through the window and opened the door and they entered the sitting room which they found in disarray. When they went upstairs, they found the family comprising of 4 females and 1 young man locked up in the master bedroom and upon their entry they found a man in a pool of blood with an open wound on the neck whom they took to the Hospital. They also recovered a spent cartridge on the floor which he exhibited.

29. It was his evidence that the injured man was **Philip Godama**, a former Moyale MP and was a licensed firearm holder of Ceska Pistol which he exhibited together with the magazine, firearm certificate and 12 bullets. According to him, the firearm was taken for ballistic examination. At about 6am the scene of crime personnel arrived. They also recorded statements from which they got the information that the attackers stole 2 TVs, 2 laptops plus mobile phones.

30. He stated that he wrote to Safaricom and Airtel to track the stolen phones whose serial numbers he disclosed. Later they got a report that IMEI Nos. 355673068047328 LG G3 mobile phone was in use with No. 0789xxxxx registered in the name of **Bernard Mutura**. He also exhibited the request letter and the mobile phone box. According to him, the mobile phone was in use 3 days after the robbery. He was later informed by the DCIO Mlolongo, that 2 suspects, the accused, were arrested on 2nd June, 2015. He stated that the Appellant upon being arrested led the police officers to the 2nd accused. Though the scene of crime was dusted for fingerprints, the witness was unaware if they matched the accused's. However, at the time of his arrest, the Appellant was in possession of the sim card plate for No. 0789xxxxx serial no. 878925159712378. He exhibited the sim card plate, the photocopy of the ID No. 12xxxxxx, Appellant's Equity ATM Card, Appellant's Staff ID No. and IEBC Card. The said stolen phone, according to him, was used three days after the incident by the Appellant though the Appellant informed the police that it was the 2nd accused who gave him the phone and that he got it from the 2nd accused's shop, who operated a phone repair shop. Thirty mobile phones which were recovered at the shop were however returned.

31. In cross-examination, he stated that no exhibit was recovered from the accused though the Appellant's line was used in one of the phones that was stolen during the robbery. Though the scene was dusted, none of the accused's finger prints were found at the scene. In his evidence some of the attackers who numbered 5 were masked while others were not.

32. According to his information the attackers were armed with rifles though the 9mm cartridge is from a pistol. In his evidence the capacity of the ceska pistol is 15 bullets. Though the Appellant informed them that he had been given the phone by the 2nd accused, the same was not recovered. However, there was call data to show that the phone was used. In re-examination he stated that there were 13 bullets.

33. PW9, **IP Reuban Bett**, a firearm inspector, testified that the items in question were examined by his colleagues, **James Onyango** and Flora with whom he had worked for 7 years and he was familiar with their handwritings. He therefore produced the said reports. Received were a spent cartridge with an exhibit memo form. According to the report, the spent cartridge was of calibre 9 by 19 mm and the same did not reveal any match but the cartridge was fired by a pistol. He produced the spent cartridge and the form as exhibits. He also had a report prepared by **CIP Otieno** in respect of Browning Pistol plus pistol magazine and 13 rounds of ammunition. According to the report, the pistol was in good condition as well as the rounds of ammunition. According to the report, the pistol did not have a crime record and did not match the spent cartridge at the scene. It was however not possible to tell when the gun was last fired.

34. PW10, also the arresting officer was instructed by the OC Special Crime, **Mr Noah Katumo**, to take over investigations of the case. According to his investigations, several items were stolen including phones and laptops which he set out. On 15th May, 2015 the officer in charge of SCPU instructed him to proceed to Machakos CCIO's office and upon his arrival the CCIO shared with him information that the stolen phone was detected to have been used by Airtel G3 Imei 355673068047328, whose subscriber was 0789251597, **Bernard Mutura**. From the data they got his alternative Safaricom No. 0721725785 and upon monitoring his movements, they arrested him on 2nd June, 2015 at Kariokor Market. Upon his arrest, the Appellant confirmed that he was the owner of 0789251597 which was lost in late March in the hands of one **Samson Gitau** who owned a mobile accessory shop. Upon being asked for the LG phone, the Appellant informed them that some time in February he took his phone to the 2nd accused's shop for charging and the 2nd accused gave him a phone to use which happened to be an LG phone.

35. On proceeding to the 2nd accused's shop, the 2nd accused confirmed that he knew the Appellant and that he gave the Appellant a phone to use while the Appellant's phone was charging though the 2nd accused was unable to remember what phone it was as he did not keep records. Upon a search being conducted, several phones were recovered with tampered serial numbers which were suspected to have been stolen. The 2nd accused was arrested and taken to Mlolongo Police Station. According to the witness, it was curious that only the Appellant's sim card

was lost and not the phone.

36. PW11, **Dr. Peter Ndegwa**, the pathologist on 14th February, 2015 performed post mortem on the body of **Philip Godana** at Shallow Hospital and concluded that the cause of death was due to severe neck injuries due to a single gunshot at close range.

37. Upon being placed on is defence, the Appellant, in his sworn evidence, stated that, being a maker of Maasai Sandals, on 10th February, 2015, he was called by a customer, **Japheth Otieno**, who gave him an order for 100 pairs of shoes which the Appellant informed him would take 3 days at an agreed cost of Kshs 400/- per pair which the said customer paid and was to ship the same on 13th February, 2015. When the customer returned at 10am, he found the said order being processed. According to the Appellant there was power problem at 2pm but the customer said he would wait for him to process the order. They waited till 8pm and since the customer said he would not travel at night, they agreed to go to the Appellant's house and the Appellant would complete the order the following day. They arrived at Huruma at 9pm and slept at 11pm.

38. On 14th February, 2015, the night he was supposed to have been involved in the robbery, the Appellant went to work at 6am and continued with the order and at 11am the order was ready. On 16th February, 2015, he went to work till 1pm during which time his phone was at the 2nd accused's repair house at Kariokor Market. When he went to the shop, he found that the 2nd accused was unable to get the materials and he gave the 2nd accused 2 days to do so. In the meantime, the 2nd accused gave him a small phone, a techno with one line, to use. According to him, when he took his phone for repair, there was a young man called Mambo at the shop.

39. Since his phone that had a problem had slots for two lines, the Appellant removed his Safaricom line, 0721725785, and put it in the phone he was given by the 2nd accused and left the Airtel line, 0789251597, in the phone that was being repaired. Later when he went to collect his phone, he paid Kshs 500/- and the said Mambo was told to hand over his phone which Mambo did. However, the Appellant's airtime line was missing and when he asked the 2nd accused about it, the 2nd accused sought an explanation from Mambo but the line could not be traced. The 2nd accused promised to look for it but when the Appellant returned on 19th February, 2015 to check it had not been traced.

40. When the Appellant was arrested on 2nd June, 2015, he was informed that his Airtel line had been used in a stolen line and he informed the police how he lost the said line. Based on his information, the 2nd accused was arrested and the phones carried away. It was his evidence that no identification parade was conducted upon his arrest. He however stated that he never reported the loss of his line to the police as the 2nd accused had promised to locate it. In his evidence, the testimony by the prosecution witnesses that they saw him on the night of the attack was a lie.

41. DW2, **Japheth Otieno**, who was a trader in Maasai sandals confirmed that he was with the Appellant in the Appellant's house on 13th February, 2015 when he went to pick his order and was unable to do so since the Appellant had not finished the same.

42. DW2, **Samson Gitau**, the 2nd accused confirmed that on 16th February, 2015 at 1pm the Appellant went to his shop as the Appellant had a problem with his phone. He gave the said phone to his employee, Mambo to check and since he had no spares for the phone, the Appellant, whom he had known from 2012, was told to return after 2 days. When the Appellant requested him for a phone to use in the meantime, he gave him his techno phone and the Appellant removed his Safaricom line and put it in the 2nd accused's phone while the Appellant's Airtel line remained in in the appellant's phone. According to the 2nd accused, **Felix Mambo**, his employee from Makueni, repaired the Appellant's phone the following day and when the Appellant went to collect the same on 18th February, 2015 at around 1pm, upon payment of Kshs 500/- Mambo was directed to release the phone by the 2nd accused and it was then that it was discovered that the Appellant's Airtel line was missing. Despite ordering Mambo to look for the Appellant's line, the same could not be found and the 2nd accused promised to hand it over later. In the 2nd accused's evidence the said number was pin less.

43. According to the 2nd accused, on 13th and 14th February, 2015, he was not at Mombasa Road and had never been there till the time of his arrest on 2nd June, 2015 by two police officers in the company of the Appellant. After his arrest, he told the said Mambo to close the shop and the said Mambo disappeared and has never been found.

44. In her judgement, the learned trial magistrate found that at the time of the robbery, the lights were on and PW1 clearly saw the faces of the robbers and stated they were of dark complexion and though their had muffles on, their faces were not covered. She positively identified the accused in court as part of the gang and described the attackers to the police. She also identified the Appellant at Machakos CID Office. As for PW1 whose phone was lost in the process, she stared at the 2nd accused, who had a navy blue jumper, very well when he demanded for money. PW2 also testified that the Appellant, who had distinguished features, had a red jumper and she saw him very well as he was the first to enter the room. That the robbers did not cover their faces was, according to the learned trial magistrate, confirmed by PW3, who testified that there was light in the corridor and some robbers had spotlights. She also saw the robber in navy blue jumper whose eyes were sunken and had conversation with the robbers. This witness, according to the learned trial magistrate, saw the 2nd accused, who wore a red jumper, searching the bags while holding a gun while the Appellant threatened to kill them.

45. The learned trial magistrate therefore found that the three witnesses were at the scene of crime and the lights were on so they saw the accused well and having described the distinguishing features of the accused and how they were dressed, she had no doubt that the said witnesses saw the accused and were able to recognise them since there was sufficient lighting despite the incident having taken place in the middle of the night. Though the accused covered their hair, they did not cover their faces and the said three witnesses were able to see their clothing, the complexion of their skin and distinguishing features on their faces like the sunken eyes. The learned trial magistrate therefore had no doubt in her mind that the accused were positively identified as part of the gang that robbed and killed the deceased.

46. The trial court also found that based on the evidence of the said three witnesses the accused who were in the company of 2 others, armed

with pistols and who threatened to kill if money was not released to them and actually killed the deceased after stealing properties from the house, the ingredients of the offence of robbery with violence were proved. She found that the Appellant's defence was a mere denial as the accused did not produce any documents in support of their trade. She therefore found the accused guilty as charged, convicted them accordingly and sentenced the Appellant to served 40 years imprisonment for each of the counts, the sentences running concurrently. According to the learned magistrate, the reason for the disparity in sentences between the Appellant and the 2nd accused who was sentenced to 10 years on each count was the fact that as opposed to the 2nd accused whose was simply ransacking the house and demanding for money, it was the Appellant who pulled the trigger and killed the deceased.

47. In this appeal, it is submitted on behalf of the Appellant that since the witnesses had never seen the robbers before that day, their purported identification in Court can only be classified as dock identification and it has been held severally that dock identification without an earlier identification parade is worthless.

48. It was further submitted that the prosecution case was also riddled with contradictions. It was submitted that there were three totally different version/ narration of stories from PW1, PW2 and PW3 on which part of the body of PW 1 the alleged gun had been placed, the back, head and hand are totally different and distant body parts.

49. It was also noted that there were contradictions as regards the roles of the 4 thugs in the parent's bedroom with PW2 stating that two guys remained at the door, one ransacked dad wardrobe and the other ransacked the bed while PW3 stated that 3 of the thugs entered their room, two ransacked the house and one remained at the door. Regarding the assailants' cloth design, it was noted that according to PW2, accused 2 had navy blue jumper and accused 1 had a red jumper, meaning that both the 1st and 2nd accused persons had jumpers while PW2 stated that 4 people attacked them, 3 had dark jackets and accused 1 had a red jumper, meaning that only accused 1 person had a jumper while the other 3 assailants (2nd accused person included) had jackets. It was submitted that for purposes of cloth designing a jumper and a jacket are two different cloths/ designs. The key difference being that a jacket has a front opening and is put through the hands whereas a jumper is put over the head since it has no front opening.

50. As regards the colour, it was noted that PW2 stated that Accused 2 had navy blue jumper and accused 1 had a red jumper while PW3 stated that Accused 2 wore red jumper that he tied on his waist while Accused 1 had long sleeved navy blue jumper and dark trouser. Regarding the assailants' faces and masking, it was submitted that PW1 stated that the faces were not covered and PW 2 stated that the thugs had not hidden their faces. However, PW 8 stated that some thugs were masked.

51. It was also noted that there was discrepancy regarding the value of the stolen items. And that since the charges facing the appellant are capital in nature, there should be no room for speculation, assumption, guesswork, gap filling or contradiction. Regarding the assailants' description of physical features to the police and to court, it was noted that PW 1 in examination in chief stated that the robbers were of chocolate dark complexion and were around her height, but on cross examination and on being shown her statement with the police PW 1 stated that in her description of the persons who attacked her, the police who wrote the statement did not state in her statement that she described the suspects.

52. It was submitted that the aforementioned contradictions cannot be said to be immaterial for witnesses who claim to have 'clearly seen' the assailants. It even casts doubt on the issue of adequacy of lighting and proper identification.

53. As regards the identification parades, it was submitted that On 15th November, 2016 the parties the Prosecution and the Defence extensively consulted and entered into a consent in court to the effect that the Identification Parades be disregarded and or would not be considered in the hearing and determination of this case. The same was adopted as court order. It was submitted that in the absence of a properly conducted identification parade, the visual identification by PW1, PW2 and PW3 just but amounted to dock identification and in this regard the Appellant relied on the case of Fredrick Ajode Ajode v Republic [2004] eKLR where the Court of Appeal held that:

“It is trite law that dock identification is generally worthless and a court should not place much reliance on it unless it has been preceded by a properly conducted identification parade. It is also trite law that before such a parade is conducted, and for it to be properly conducted, a witness should be asked to give the description of the accused and the police should then arrange a fair identification parade (see case of Gabriel Kamau Njoroge v Republic (1982-88) 1 KAR 1134).”

54. The Appellant also cited the case of Francis Koikai Katikenya & 2 Others vs. Republic [2006] eKLR, where the Court while citing the case of Cleophas Otieno Wamunga –vs- Republic, Kisumu Cr. App. No. 20 of 1982, stated that:

“It is on record that the offence was committed at night and the robbers took a while with the complainants before they left. They were armed with torches from whose light PW1 and PW2 managed to identify the 1st and 2nd Appellant. There was also light from the kitchen which PW2 claimed assisted in identifying 3rd Appellant. Was the identification of the Appellants in the circumstances aforesaid watertight and free from possible error? We do not think so. As stated in the celebrated case of REPUBLIC –VS- TURNBULL (SUPRA), the Court is expected to make certain inquiries regarding light. In the instant since the Prosecutor had failed to lead evidence regarding the light case the trial Magistrate ought to have inquired as to the intensity of the torchlight as well as the light from the kitchen. The Court was not told the number of torches that were involved and their sizes. This would have assisted to determine the beam and intensity of the light.....”

55. The learned judges further held that:-

“The matter was further compounded by the failure by the Police to conduct an identification parade in respect of these Appellants. There was absolutely no reason why an identification parade was not conducted in respect of the 1st and 2nd Appellant so as to enable the two witness identify the Appellants. Had it been done and the two witnesses successfully picked

out the Appellants this would have provided the necessary corroboration of their evidence regarding the identification of the Appellants at the scene of crime...Their purported identification by PW1 and PW2 in Court can only be classified as in Court can only be classified as dock identification. It has been held severally that dock identification without an earlier identification parade is almost worthless (See KIARIE VS REPUBLIC (1984) KLR 735 and NJOROGI VS REPUBLIC (1987) KLR 9.”

56. In this case it was submitted that whereas PW1, PW2 and PW3 stated that corridor lights were all on and that they could see the robbers clearly, the prosecution witnesses did not state the number of corridor lights and intensity of the light. According to the Appellant, it is not for the court to assume that the light was bright enough and that the prosecution failed to discharge the burden. Further, PW1, PW2 and PW3 said that the robbers had spot lights during the robbery and ransacking. It beats logic for the robbers to have the spot lights on and use them if at all the lighting at the scene of crime was bright enough. The court was urged to be conscious of the fact that many witnesses do not properly identify another person even in day light and it is therefore prudent for the court to ascertain the nature of the light available, the type of light, its size and its position in relation to the suspect when dealing with the issue of identification. In this regard the Appellant cited the case of **Boru Halkano Dido vs. Republic [2019] eKLR** and submitted that the evidence of PW3 that she only saw the robbers on the date of robbery and court was clearly dock identification which should be disregarded.

57. It was further submitted that in the absence of the evidence that the assailants had gloves, it was expected that the assailants' finger prints were or would be all over the scene of scene. However, as the dusting and analysis results were negative when matched with the appellant's finger prints, that lends credence to the appellant's defence of alibi and in turn discredits the testimony of PW 1, PW 2 and PW 3 on identification. PW 1, PW 2 and PW 3 as simply untrustworthy.

58. According to the Appellant, since PW10 said that they established that the appellant had an Airtel and Safaricom number, as part of their investigations, the police should have obtained the appellant's call data and records from the respective service providers to establish whether the data placed the appellant at the scene of crime (syokimau) on night of 13th & 14th February 2015. Without an identification parade coupled with the negative fingerprint dusting and analysis report, it was submitted that the prosecution failed to adduce evidence to place the accused persons at the scene of crime. Accordingly, the only link of the appellant to the crime was mobile phone, L.G3 IMEI No. 355673068047328 that was stolen during the robbery on the night of 13th & 14th February 2015 and was used on 17th February, 2015. That sim card, PW 6 stated was in the phone for less than a second. It was however noted that the trial magistrate in held that the investigations conducted from the mobile subscriber and by the investigating officer that phone had been used three days consecutively after the robbery. According to the Appellant, that was a serious misdirection and poor analysis of the evidence since the court record show that the appellant's Airtel line no. 0789251597 was inserted in the said stolen phone three days after the robbery for a duration of less than a second.

59. It was noted that while the appellant admitted to owning the Airtel line no. 0789251597, he explained what transpired between himself and the 2nd accused. According to the Appellant, the phone that the appellant received from the 2nd accused person on 16th February, 2015 for use between 16th February, 2015 and 18th February, 2015 cannot be the PW 2's handset serial no. 3556730680473280 that was allegedly stolen on night of 13th & 14th February 2015 during the robbery, because, if the 2nd accused person had given the stolen phone to the appellant as the alternative phone for use, then only the appellant's Safaricom line would have been inserted into the stolen phone (as the Airtel line was left in the damaged phone) and the subject phone would have been used from 16.2.2015 to 18.2.2015 i.e. date of taking appellant's damaged phone for repairs to the date of collecting it. It was noted that DW3 corroborated the appellant's testimony in detail and even admitted being left with the appellant's damaged dual phone, the appellant removing only his Safaricom line and leaving the Airtel line in the damaged phone. DW3 even admitted that the appellant's Airtel line was left in his custody and got lost while in his custody. It was therefore submitted that it is clear that the appellant was not in control and possession of his Airtel line no. 0789251597 on 17.2.2015 when it was inserted in L.G3 IMEI No. 355673068047328. It's also clear that the alternative phone given to the appellant by DW 3 was a Techno button phone NOT the L.G3 IMEI No. 355673068047328. Further, the appellant did not visit DW3's Pats Mobile Repairs shop on the said 17.2.2015 as confirmed by the appellant himself and DW3. The appellant was thus wrongly accused in the alternative charge of Count II.

60. Based on the evidence of PW 6 that some Airtel sim cards can be operated without a PIN while others have 0000 pin as corroborated by DW3 it was submitted that someone else might have come across DW 1's Airtel line and inserted it in the stolen LG phone without the appellant's knowledge.

61. Based on the foregoing, the Appellant prayed that the appeal be allowed.

62. On behalf of the Respondent, it was submitted that the pertinent question is whether the ingredients of the offence of Robbery with Violence as set out in **Johana Ndungu vs. Republic Criminal Appeal No.116 of 1995** were proved. According to the Respondent, it is trite law that proof of any one of the above ingredients of robbery with violence is enough to sustain a conviction under Section 296(2) of the **Penal Code**. In this case it was submitted that PW1, PW2 and PW3 stated in their testimonies in court that the robbers were four in number and were armed with pistols. They added that they were shown live bullets by the robbers while threatening them to give out money. After the robbers could not find money, they fatally shot their father who succumbed to the injuries. It was also submitted that the same witnesses testified that there were four people who attacked them and they were armed with pistols and that the robbers threatened to kill if money in terms of millions were not released to them. The assailants actualized their threats by fatally shooting **Hon. Philip Godana** as proved by the post mortem report prepared by **Dr Ndegwa** which showed that the deceased had a gunshot wound on the left side of the neck and the cause of death was severe neck injury. Pw2 was also hit on the back of the head with a gun butt and thereafter, several items were stolen from the homestead by the robbers.

63. From the evidence on record, it was submitted, the prosecution proved all the essential ingredients for the offence of robbery with violence.

64. As regards the identification of the Appellant, reliance was placed on the decision of **Lord Widgery C.J.** in the case of **R. vs. Turnbull and Others [1976] 3 All ER 549** and the decision of the Court of Appeal in **Karanja & another vs. Republic (2004) 2 KLR 140, 147.**

65. It was submitted that on the question of identification of the assailants it according to the testimony of PW1, PW2, and PW3, they were

able to positively identify the Appellant since the lights on. Pw1 further stated that he saw the faces of the robbers clearly as the lights were on. He added that they were of dark complexion and they had muffled faces but their faces were not covered. He also described the attackers to the police. PW2 on the other hand stated that they asked him if he had money in his mobile phone and he stared at him. He added that accused 2 had a navy-blue jumper and the appellant had a red jumper. He also saw the appellant well as he was the first one to enter the room, and the appellant had distinguished features. Pw3 in her testimony stated that the robbers had not covered their faces, but had covered their hair. She added that she saw a robber in a navy-blue jumper and his eyes were sunken. She further added that she had conversation with the robbers and the appellant threatened them that if they don't give the money they would be killed. Thus, this ground of appeal, according to the Respondent, lacks merit and should be dismissed.

66. As regards the Appellant's alibi defence, the Respondent relied on **Charles Anjare Mwamusi vs. R CRA No. 226 of 2002 and Victor Mwendwa Mulinge vs Republic**, and submitted that the correct approach is for the trial court to exhaustively examine the entire prosecution evidence in totality and weigh it against that of the appellant and make a finding supported by reasons that the prosecution case displaced the defense raised by the appellant. It was submitted that when the appellant was placed on his defense, he gave a sworn statement which was concerned with how he got the mobile phone. However, there was no alibi adduced by the appellant at the trial court as the phone was stolen in the process of the robbery. The same phone was paired with a SIM card 0789251597 registered in the name of the appellant. The investigations conducted by the investigating officer and the mobile subscriber indicated that the phone was used three consecutive days after the robbery. The Police used the alternative number for the appellant to effect his arrest. The appellant led the police to the second accused as the person who had given him the mobile phone to use as his phone was under repair. He alleged he got it from the second accused who did not deny having issued the phone to the appellant. However, he did not inform the court how he came about the phone that was a stolen property. The defense tendered was that the appellant Safaricom line got lost while his phone was being repaired in second accused shop and an employee of second accused lost the SIM card. The employee of the second accused was never called as a witness to confirm that indeed he lost a SIM card for the appellant that was used in the stolen phone. The learned trial magistrate after considering the evidence adduced by both parties found that the Appellant could not exonerate himself from the offence. Therefore, the trial magistrate went ahead and dismissed it as an afterthought and convicted him as the prosecution had proved their case beyond reasonable doubt.

67. In view of the foregoing, it was submitted that the appellant's defense was an afterthought which was aimed at deceiving the court to defeat the course of justice and could not displace the evidence adduced by the prosecution hence this ground of appeal is devoid of any merit and should be dismissed.

68. It was therefore the Respondent's submissions that the prosecution proved its case beyond any reasonable doubt as the evidence tendered was credible, consistent and well corroborated and prayed that this appeal be dismissed, and both the conviction and sentence of the trial court be upheld.

Determinations

69. This being a first appeal, the court is expected to analyse and evaluate afresh all the evidence adduced before the lower court and draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

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

70. Similarly, in the duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in **Pandya -vs- Republic [1957] EA 336** is as follows: -

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

71. In **Kiilu & Another vs. Republic [2005]1 KLR 174**, the Court of Appeal stated thus:

1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

2. 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; 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.

72. In criminal cases, it is old hat that the burden of proof lies with the prosecution and the standard of such proof is beyond reasonable doubt. **Viscount Sankey L.C** in the case of **H.L. (E)* Woolmington vs. DPP [1935] A.C 462 pp 481** in what has been described as a subtle and masterly fashion stated the law on legal burden of proof in criminal matters, that;

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

73. According to **Halsbury’s Laws of England**, 4th Edition, Volume 17, paras 13 and 14:

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

74. What then is the standard of proof required in such cases? **Brennan, J** in the United States Supreme Court decision in **Re Winship 397 US 358 {1970}**, at pages 361-64 stated that:-

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

75. In 1997, the Supreme Court of Canada in **R vs. Lifchus {1997}3 SCR 320** suggested the following explanation:-

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

76. In **JOO vs. Republic [2015] eKLR**, **Mrima, J** held that:

“It is not lost to this Court that the offence which the Appellant faced was such a serious one and ought to be denounced in the strongest terms possible. However, it also remains a cardinal duty on the prosecution to ensure that adequate evidence is adduced against a suspect so as to uphold any conviction. The standard of proof required in criminal cases is well settled; proof beyond any reasonable doubt hence this case cannot be an exception. This Court holds the view that it is better to acquit ten guilty persons than to convict one innocent person.”

77. **Matavo, J** in **Elizabeth Waithiegeni Gatimu vs. Republic [2015] eKLR** expressed himself as hereunder:

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

78. What then amounts to reasonable doubt? This issue was addressed by **Lord Denning** in **Miller vs. Ministry of Pensions, [1947] 2 ALL ER 372** where he stated:-

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

79. Proof in criminal cases can either be by direct evidence or circumstantial evidence. When a witness, such as an eyewitness, asserts actual knowledge of a fact, that witness' testimony is direct evidence. On the other hand, evidence of facts and circumstances from which reasonable inferences may be drawn is circumstantial evidence. Therefore, where circumstantial evidence meets the legal threshold, it may well be a basis for finding the accused person culpable of the offence charged. In fact, in **Neema Mwandoro Ndurya v. R [2008] eKLR**, the Court of Appeal cited with approval the case of **R vs. Taylor Weaver and Donovan (1928) 21 Cr. App. R 20** where the court stated that:

“Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.”

80. In this case, the complainant's case in summary was that on the night of 13th and 14th February, 2013 2.13am, robbers attacked the complainants' house at Professor Court Estate, Syokimau Area, in Athi River. In order to gain access to the house they cut the grill. The said robbers were four in number and they were armed with pistols. They demanded Kshs 1 million which they claimed was in the house and threatened to kill the complainants if the said demand was not met. Upon failing to get the said money they shot dead PW3's husband, the head of the household and then carted away the household items.

81. According to the Prosecution's case, although the attackers covered their hair, they did not cover their faces. As a result, PW1, PW2 and PW3 were able to clearly identify them as the lights were on and the attackers had torches. One of the said attackers, according to the prosecution was the Appellant herein whose phone number was three days after the attack used in one of the phones that had been stolen from the scene.

82. Section 296 of the *Penal Code* provides as follows:

(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

(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.

83. The definition of robbery however appears in section 295 thereof 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.

84. In this case the attackers were four in number. In **Masaku vs. Republic [2008] KLR 604**, the Court reiterated that:

“It is now well settled that any one of the following need be proved to establish the offence:

1. If the offender is armed with any dangerous or offensive weapon or instrument or

2. If the offender is in the company of one or more offenders or

3. If at or immediately before or immediately after the time of the robbery he wounds, strikes or uses any other violence to any person.

In this case, the particulars of the charge stated that the appellant was with another at the time of the robbery and further that at or immediately before or immediately after the time of such robbery wounded the deceased. It is plain therefore that two of the three ingredients of the offence of robbery with violence under section 296(2) of the Penal Code were given. It should be remembered that a single ingredient is sufficient.”

85. In this case, the attackers were four in number, they were armed with pistols, they threatened to cause actual bodily harm to the complainants and they did actually cause death to the deceased. Accordingly, the evidence was sufficient to constitute an offence of robbery with violence.

86. In this appeal, the appellant contends that the prosecution case was riddled with contradictions. It was submitted that there were three totally different version/ narration of stories from PW1, PW2 and PW3 on which part of the body of PW 1 the alleged gun had been placed, the back, head and hand are totally different and distant body parts. It was also noted that there were contradictions as regards the roles of the 4 thugs in the parent's bedroom with PW2 stating that two guys remained at the door, one ransacked dad wardrobe and the other ransacked

the bed while PW3 stated that 3 of the thugs entered their room, two ransacked the house and one remained at the door. Regarding the assailants' cloth design, it was noted that according to PW2, accused 2 had navy blue jumper and accused 1 had a red jumper, meaning that both the 1st and 2nd accused persons had jumpers while PW2 stated that 4 people attacked them, 3 had dark jackets and accused 1 had a red jumper, meaning that only accused 1 person had a jumper while the other 3 assailants (2nd accused person included) had jackets. It was submitted that for purposes of cloth designing a jumper and a jacket are two different cloths/ designs.

87. As regards the colour, it was noted that PW2 stated that Accused 2 had navy blue jumper and accused 1 had a red jumper while PW3 stated that Accused 2 wore red jumper that he tied on his waist while Accused 1 had long sleeved navy blue jumper and dark trouser. Regarding the assailants' faces and masking, it was submitted that PW1 stated that the faces were not covered and PW 2 stated that the thugs had not hidden their faces. However, PW 8 stated that some thugs were masked.

88. It was also noted that there was discrepancy regarding the value of the stolen items. And that since the charges facing the appellant are capital in nature, there should be no room for speculation, assumption, guesswork, gap filling or contradiction.

89. I have considered the evidence on record and I agree that there were discrepancies in the evidence of PW1, PW2 and PW3 as regards the occurrences of that night.

90. I find myself persuaded to borrow the definition rendered by the Court of Appeal of Nigeria in the case of **David Ojeabuo vs. Federal Republic of Nigeria** {2014} LPELR-22555(CA), where the court (Adamu JA; Ngolika JA; Orji-Abadua JA; & Abiru JA) stated as follows:-

"Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."

91. Whereas I appreciate that there were minor discrepancies in the evidence of the prosecution witnesses, it is my respectful view that such minor discrepancies are common. Whether or not discrepancies in the evidence of witnesses have the effect of discrediting that evidence would depend upon the nature of the discrepancies, that is to say, whether or not the discrepancies are trifling. See ***Law of Evidence (10th Ed) Vol. 1 at 46.***

92. As was stated in **John Cancio De SA vs. V N Amin Civil Appeal No. 27 of 1933 [1934] 1 EACA 13:**

"Probably every judge has had occasion at some time or other to regard discrepancies as showing veracity, and to regard uniformity as showing fabrication, but it depends upon the nature of the discrepancies and the uniformity. If two people allege that they made a journey together from Kampala to Nairobi and they differ on such details as the time the train stopped at Eldoret, what they had for lunch and dinner, and whether it rained on the journey and where, it would be more reasonable to argue a difference in memory than that the journey was never undertaken. But if one says they made the whole of the journey by rail, and the other says they went to Entebbe by car and thence by air to Nairobi, it would be more reasonable to argue that the journey never took place than that one or both suffered from a defective memory."

93. This was the position in **Willis Ochieng Odera vs. Republic [2006] eKLR,** where the Court of Appeal held:

"As for the contradictions in the prosecution evidence it may be true that such contradictions, particularly with regard to the date indicated on the P3 form as the date of the offence, is different. But that *per se* is not a ground for quashing the conviction in view of the provisions of section 382 of the Criminal Procedure Code."

94. In the case of **Njuki vs. Rep 2002 1 KLR 77,** the court said the following in respect of discrepancies in the evidence of witnesses:

"In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. About what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused... however, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused."

95. In **Philip Nzaka Watu vs. Republic [2016] eKLR,** the Court of Appeal held that:

"The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt. However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest 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 recognised in many decisions of this Court, some inconsistency 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.”

96. In Dickson Elia Nsamba Shapwata & Another vs. The Republic, Cr. App. No. 92 of 2007 the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows:

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

97. In Erick Onyango Ondeng’ vs. Republic [2014] eKLR, the Court of Appeal held that:

“The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honoured device for testing the truth or correctness of evidence. Next is the first appellate court which by law, it is its bounden duty to re-consider, re-evaluate and analyse the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified. (See OKENO VS REPUBLIC (1972) EA 32). It is in the above context that this Court has said time and again that it will defer to and respect findings of fact by the trial court as affirmed by the first appellate court after due re-evaluation and analysis, because the second appellate court operates from the distinct advantage of not having seen or heard the witnesses. This Court will therefore not interfere with findings of fact by the two courts below unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole, the courts below were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.”

98. As was noted in Twehangane Alfred vs. Uganda, Crim App. No. 139 of 2001, [2003] UGCA, 6:

“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”

99. In Joseph Maina Mwangi vs. Republic CA No. 73 of 1992 (Nairobi) Tunoi, Lakha & Bosire JJA held: -

“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence.”

100. Each case must be considered on its own particular circumstances. There are cases where the inconsistency is so minor that clearly it will be of little effect and certainly does not necessarily mean that the witness is lying or that his testimony cannot be relied on. The judge must take all the evidence and all the circumstances of the case into account in deciding whether to accept a witness’s evidence or any part of his testimony. (Nyakisia v. R. E. A. C. A. Crim. App. 35-D-71; -/5/71; Duffus P., Spry VP. & Lutta JA., in the East African Court of Appeal).

101. Where an incident occurs in the middle of the night and the attack happens under the circumstances of shock and fear as was the case in the matter herein, one expects certain inconsistencies in the evidence of the witnesses. Such inconsistencies, as is stated above, may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. What the Court has to decide is whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence. I agree with the holding in on Onubugu vs. State 119741 9 S.C.1 Kem vs. State (1985)1 NWLR where the court was of the opinion that:-

“Where prosecution witnesses have given conflicting version of material facts in issue, the trial judge by whom such evidence is led must make specific findings on the point and in so doing must give reasons for rejecting one version and accepting the other. Unless this is done, it will be unsafe for the court to rely on any of the evidence before it.”

102. However, this being a first appellate court, the omission by the trial court to deal with the same is not necessarily fatal to the decision arrived at. Whether or not discrepancies in the evidence of witnesses have the effect of discrediting that evidence would depend upon the nature of the discrepancies, that is to say, whether or not the discrepancies are trifling. See Law of Evidence (10th Ed) Vol. 1 at 46.

103. I have myself subjected the evidence adduced to fresh scrutiny and though it is true that there were inconsistencies in the evidence of the said witnesses, I am unable to find that the inconsistencies regarding the positions of the attackers, the value of the items stolen, the attire worn by the attackers and the position of the gun whether on the head of PW1 or not, were not material enough to warrant interference with the decision.

104. In this appeal, it is submitted on behalf of the Appellant that since the witnesses had never seen the robbers before that day, their purported identification in Court can only be classified as dock identification and it has been held severally that dock identification without an earlier identification parade is worthless. In James Tinega Omwenga vs. Republic [2014] eKLR, the Court of Appeal held that:

“The law is settled, that in general, identification of a suspect who was a stranger at the time the offence was committed, which was not followed by the witness describing the suspect to the police who would organize a properly conducted identification parade at which the witness is afforded an opportunity to affirm his identification by pointing out the suspect, is a dock identification which in some cases is regarded as worthless. In the case of Njoroge -vs- Republic (1987) KLR 19, this Court stated:-

“Dock identification is worthless the court should not rely on a dock identification unless this has been preceded by a properly conducted identification parade. A witness should be asked to give description of the accused and the prosecution should then arrange a fair identification parade”.

105. In Boru Halkano Dido vs. Republic [2019] eKLR the Court of Appeal held that:-

“It is clear to me that the complainant only identified the appellant at the dock. No identification parade was conducted for both PW1 as well as the appellant’s co-accused. In the case of Kiarie V Republic [1984] KLR, 739, the Court of Appeal held inter alia:-

‘The identification of an accused person in Court by a complainant is almost worthless without an earlier identification.’

The appellant was arrested and taken to the Police station. What was so urgent such that the police could not have conducted an identification parade for PW1 to enable him identify the appellant. PW1’s insistence in court that it is the appellant who robbed him cannot amount to identification. PW1 did not know the appellant before. Pw1 did not give the description of his robber, to the police. It is both normal and usual for a complainant who is testifying to point at the person on the dock as the one who committed the offence. At that time it is normally the accused seated alone in the dock. The complainant simply presume that the police must have done a good job and arrested the correct perpetrator of the offence...Given the fact that PW1 did not give some form of description of those who robbed him to the Police and in view of the fact that the complainant was only called to testify after the suspect had been arrested. I do find that the dock identification of the appellant by PW1 is inconsequential. The offence occurred on 5th July, 2018. The appellant was arrested over two weeks later on 24.7.2018. The police had all the time to conduct an identification parade so as to enable PW1 identify the appellant.”

106. However, in Nathan Kamau Mugwe vs. Republic [2009] eKLR, the Court of Appeal expressed itself as follows:

In MUIRURI & 2 OTHERS V. REPUBLIC [2002] 1 KLR 274, the Court consisting of Kwach, J.A as he then was, Bosire & Ole Keiwua, JJ.A stated at pg. 277 between paragraphs 25 and 40:-

“We do not think it can be said that all dock identification is worthless. If that were to be the case then decisions like Abdulla bin Wendo v. Rep (1953) 20 EACA 166, Roria v. Republic [1967] EA 583, and Charles Maitanyi v. Republic (1986) 2 KAR 76, among others, which over the years have been accepted as correctly stating the law concerning the testimony of a single witness on identification will have no place in our jurisprudence. In those cases courts have emphasized the need to test with the greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to found a conviction. We do not think that evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification.”

That position was again followed in the recent decision of the Court in the case of GRACE WAMBUI NJOROGE alias WANANCY & 3 OTHERS VS. REPUBLIC, Criminal Appeal No. 201 of 2006 (unreported). Having considered and compared the decisions in GABRIEL’s Case, supra, and that in MUIRURI’s Case, supra, we have come to the conclusion that the more correct position at law is the one propounded in MUIRURI’s case and not that stated earlier in GABRIEL’s case. We accept the position as stated in MUIRURI’s case rather than that in GABRIEL’s case. We must point out that Mr. Obuo must have been unaware of the latter two decisions for he did not cite any of them to us. James swore he saw the appellant from the time they met and negotiated the fare and was with him from the place of hiring upto the place where he was attacked and tied up. The appellant was sitting next to him on the front passenger seat. The trial Magistrate and the first appellate court were satisfied that James had ample time to see the appellant during the period the two were alone in the vehicle and also at the beginning of the journey. James had no difficulty in identifying him at a properly conducted identification parade. True, the evidence of James was that of a single witness and the courts below did not warn themselves on the dangers of relying on it, but if the two courts had the correct principles in mind, they would have realized that the dock identification of the appellant by Mwendo must have lent some weight to the identification by James. We think the identification of the appellant was, in all the circumstances of the case, sound and even if the two courts below had excluded the evidence of Mwendo with regard to the parade, they would have inevitably come to the conclusion that the appellant had been properly and correctly identified as the person who had hired James at Cheers Makuti Bar and subsequently robbed him in the company of another person. As to the complaint in ground six that the witnesses had not given to the police a 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. On the failure to produce the car taken away from James, nothing can turn on that. The photographs of the car taken by the police were produced and there was no complaint by anyone that the photographs were not a true representation of the car. Other items such as money were stolen and were never recovered. We find no substance in the complaint with regard to the car. In our view, the charge against the appellant was proved beyond any doubt that is reasonable and that being the view we take of the matter, we must order, as we hereby do, that his appeal against the conviction be dismissed. The sentence imposed was the only one available in law and there can be no basis for interference by us. The appeal fails in its entirety and these shall be the orders of the Court.”

107. The law, as I understand it, is that dock identification is not worthless for all purposes. It may well be a basis for a conviction where the Court satisfies itself that on the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification. Therefore, all the circumstances of the case must be taken into consideration before the Court makes a decision as regards the veracity of the dock identification. In this case, PW1 recorded her statement some 9 days after the incident. In that statement, there is no indication that she disclosed the description of the attackers. There seems to have been an attempt to conduct identification parade but eventually it was agreed that the evidence relating to the said parade would not be admissible. Accordingly, the Court was denied the opportunity of verifying whether the witnesses could identify their attackers before they testified in Court and the circumstances under which the said parades took place.

108. In matters of identification, it was appreciated in R vs. Turnbull & Others (1976) 3 All ER 549 that:

“The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? *In what light?* Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?...Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.” [Emphasis added].

109. In this case, according to PW1, he saw the attackers for 5 minutes. PW3, on the other hand mentioned one hour.

110. The importance of the first report was restated in Tekerali s/o Korongozi & 4 Others vs. Rep (1952) 19 EACA 259 where it was held that:

“Their importance can scarcely be exaggerated for they often provide a good test by which the truth or accuracy of the later statements can be judged, thus providing a safeguard against later embellishment or the deliberately made-up case. Truth will often [came] out in the first statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others.”

111. In this case, although it was indicated that there was light, there was no inquiry as to the quality of the light. For example, how powerful were the lights and what was the colour of the bulbs or tubes? These are matters that ought to have been gone into considering the fact that the evidence of identification parade had been discounted and the matter was simply one of dock identification.

112. Notwithstanding the unsatisfactory nature of the identification, the prosecution could still prove its case based on circumstantial evidence. Proof in criminal cases can either be by direct evidence or circumstantial evidence. When a witness, such as an eyewitness, asserts actual knowledge of a fact, that witness' testimony is direct evidence. On the other hand, evidence of facts and circumstances from which reasonable inferences may be drawn is circumstantial evidence. On this issue, Mativo, J in Moses Kabue Karuoya vs. Republic [2016] eKLR expressed himself as hereunder:

“The evidence used to prove guilt is classified as either direct or circumstantial. Direct evidence, is a statement about a fact constituting a disputed material proposition of a rule of law, while circumstantial evidence is testimony about a fact or facts from which the disputed material proposition may be inferred. Thus, circumstantial evidence can be defined as relying on certain proved or provable circumstances from which a conclusion can be drawn that it was the accused person who committed the offence. It is evidence of circumstances which can be relied upon not as proving a fact directly but instead as pointing to its existence. It differs from direct evidence, which tends to prove a fact directly, typically when a witness testifies about something which that witness personally saw, or heard. Both direct and circumstantial evidence are to be considered, but to bring a verdict of guilty based entirely or substantially upon circumstantial evidence, it is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the circumstances. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty. This follows from the requirement that guilt must be established.”

113. Therefore, where circumstantial evidence meets the legal threshold, it may well be a basis for finding the accused person culpable of the offence charged. In fact, in Neema Mwandoro Ndurya v. R [2008] eKLR, the Court of Appeal cited with approval the case of R vs. Taylor Weaver and Donovan (1928) 21 Cr. App. R 20 where the court stated that:

“Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics. It is no derogation of evidence to

say that it is circumstantial.”

114. Whereas it is appreciated that a charge may be sustained based on circumstantial evidence the courts have established certain threshold to be met if a conviction is to be based thereon. In Sawe –vs- Rep [2003] KLR 364 the Court of Appeal held.

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt; Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on; The burden of proving facts which justify the drawing of this 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; Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

115. In R. vs. Kipkering Arap Koske & Another [1949] 16 EACA 135, in the Court of Appeal for Eastern Africa had this to say:

“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.”

116. In Abanga Alias Onyango vs. Rep CR. A No.32 of 1990 (UR) the Court of Appeal set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case are sufficient to sustain a conviction. These are:

“It is settled law that when a case rests entirely 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 cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

117. In Mwangi vs. Republic [1983] KLR 327 Madan, Potter JJA and Chesoni Ag. J. A. held:-

“In order to draw the inference of the accused’s guilt from circumstantial evidence, there must be no other co -existing circumstances which would weaken or destroy the inference. The circumstantial evidence in this case was unreliable. It was not of a conclusive nature or tendency and should not have been acted on to sustain the conviction and sentence of the accused.”

118. Therefore, for this court to find the accused guilty the inculpatory facts must be incompatible with innocence and incapable of explanation upon any other hypothesis than that of guilt. This proposition was well stated in the case of Simon Musoke vs. Republic [1958] EA 715 as follows:

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

119. In Teper v. R [1952] AC at p. 489 the Court had this to say:

“Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of accused’s guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference.”

120. In this case evidence relating to the call data retrieved from the Airtel phone service provider was adduced. It is not disputed that the Airtel line no. 0789251597 was registered in the name of the Appellant. The link of the appellant to the crime was mobile phone, L.G3 IMEI No. 355673068047328 that was stolen during the robbery on the night of 13th & 14th February 2015 and was used on 17th February, 2015, that use being traced to the Appellant’s said Airtel line. However, as stated by PW 6, that sim card was in the phone for less than a second. That was three days after the incident. The learned trial magistrate however misconstrued this to mean that the said phone was in use for three days consecutively after the robbery. With due respect there was no such evidence.

121. In the absence of evidence to the contrary, the Court may well have been right in finding that based on circumstantial evidence, the appellant was one of the robbers. However, the Appellant’s evidence was that on the night of the said robbery, he was sleeping in his house, evidence which was supported by DW2. He explained that he had taken his phone, with dual sim card slots for repair to the 2nd accused’s shop and in since the repair could not be done the same day, the 2nd accused lent him another phone, a single slot sim card phone in which he inserted his Safaricom line leaving the Airtel line at the 2nd accused’s shop in the custody of one Mambo, an employee of the 2nd accused. However, when he went to collect his phone, the Airtel line could not be traced and later the said Mambo disappeared. This evidence was corroborated by the 2nd accused.

122. In her judgement, the Learned Trial Magistrate took a dim view of the alibi defence. In fact, the trial court did not consider that the Appellant had raised an alibi defence. That brings us to what an alibi defence is. In the case of Patrick Muriuki Kinyua & Another vs. Republic Nyeri Criminal Appeal No. 11 of 2013 (UR) the Court held that:

“an alibi is a plea by an accused person that he was not there (was not present) at the place where the crime was committed at the time of the alleged commission of the offence for which he is charged.”

123. In this case, the Appellant’s defence was that during the time of the said robbery he was sleeping in his house. In effect his evidence was that he was not present at the place where the crime was committed at the time of the alleged commission of the offence with which he was charged. That clearly was an alibi defence and the trial court was duty bound to consider it as such and make a finding on it. Having found that there was no alibi defence, the trial court did not deal with the same at all. In Charles Wanyonyi & Others vs. Republic Kisumu Criminal Appeal No. 134 of 2004, it was held by the Court of Appeal that:

“Something needs to be said about the contents of the judgement of the learned trial Judge. It is to be observed that he carefully set out the evidence adduced by the prosecution and the defence of each appellant. Having done so it was expected that he would proceed to analyse and resolve the issues involved, giving reasons for his decision. This appears to have been omitted as the learned Judge merely relied on the evidence of PW1 and suddenly came to the conclusion that the appellants were guilty. We are not introducing any new issue here since this is what is provided for by section 169(1) of the Criminal Procedure Code (Cap. 75 Laws of Kenya)...Having set out what we considered salient points in the appeal and having noted that the learned Judge failed to give due consideration to matters relating to circumstantial evidence, identification of the appellants, contradictions in evidence by prosecution witnesses and the defence of alibi, we do not know what the final judgement by the learned Judge would have been had he applied his mind to them. We venture to state that had he taken all these matters into account, giving due consideration to each of the salient issues he would not have come to the same conclusion as he did...The curtain must come down on this appeal. The journey the appellants commenced in the trial Judge’s court on 14th May, 1998 has come to an end. In view of what we have said as regards the unattended and unresolved issues by the learned trial Judge and upon our own evaluation of the evidence on record we are of the considered view that it would be unsafe to uphold the appellants’ conviction on the two counts of murder. In the result, this appeal is allowed, convictions quashed and the sentences of death imposed on the appellants set aside. We further order that the appellants are to be set free forthwith unless otherwise lawfully held.”

124. In Wang’ombe vs. The Republic [1980] KLR 149, Madan, Miller and Potter, JJA held that:

“...in *Ssentale vs. Uganda [1968] EA 365, 368* [Sir Udo Udoma CJ]...said that a prisoner who puts forwards an alibi as an answer to a charge does not thereby assume any burden of proving that answer; it is a misdirection to refer to any burden as resting on the prisoner in such a case; for the burden of proving his guilt remains throughout on the prosecution. We agree, we have ourselves said so on more than one occasion...The defence of alibi was put forward for the first time some four months after the robbery when the appellant made his unsworn statement in court. Even in such circumstances the prosecution or the police ought to check and test the alibi wherever possible. On the other hand, however punctilious the prosecution or police, it throws upon them an unreasonable burden when the alibi is pleaded for the first time in an unsworn statement at the trial, out of the blue. Udo Udoma CJ also said that, if the alibi had been raised for the first time at the trial, different considerations might have arisen as regards checking and testing it...In England, in order to distribute the burden of the prosecution fairly, the Criminal Justice Act, 1967, section 11(1), provides that on a trial on indictment the defendant may not without the leave of the court adduce evidence in support of an alibi unless, before the end of the prescribed period, he gives notice of particulars of the alibi. Under section 11(8) ‘the prescribed period’ means the period of seven days from the end of the proceedings before the examining justices. Section 11(1) applies where the defendant alone is to testify that he was elsewhere at the material time; see *R vs. Jackson and Robertson [1973] Crim. LR 356*...The alibi was considered by both courts below, the High Court saying (as we have already set out) that it needed to be weighed with the evidence of the prosecution, particularly that of the complainant and his wife, and the fact that the appellant denied knowing Lucy, and particularly with Lucy’s evidence. To weigh one set of evidence with another set of evidence is not to remove the burden of proving that which has to be proved from the party charged with the proof of it. To marshal, analyse and dissect evidence in order to weigh it to determine its value and veracity is a basic function of judicial officers. They do not have to pendantize. What other approach is there? Judicial officers are not clairvoyant!”

125. In Victor Mwendwa Mulinge vs. Republic [2014] eKLR the Court of Appeal stated thus:

“It is trite law that the burden of proving falsity, if at all, of an accused’s defence of alibi lies on the prosecution. See *Karanja v Republic [1983] KLR 501* this court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused’s guilt is established beyond reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigations and thereby prevent any suggestion that the defence was an afterthought.”

126. In Elizabeth Waithiengi Gatimu vs. Republic [2015] eKLR where the Nigerian case of *Ozaki & Another –vs- The State* was relied, where it was held that:

“Thus it is settled law that the defence of ALIBI must be proved on balance of probabilities and that for it to be rejected it must be incredible...”

127. In Uganda vs. Sebyala & Others, [1969] EA 204 the learned Judge citing relevant precedents had this to say:-

“The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts.”

128. In the case of Adedeji vs. The State [1971] 1 All N.L.R 75 it was held that:

“failure by the police to investigate and check the reliability of alibi would raise reasonable doubt in the mind of the tribunal and lead to the quashing of a conviction imposed.”

129. The South African case of Ricky Ganda vs. The State, {2012} ZAFSHC 59, Free State High Court, Bloemfontein provides useful guidance. In the said case it was held:-

“The acceptance of the evidence on behalf of the state cannot by itself be sufficient basis for rejecting the alibi evidence. Something more is required. The evidence must be considered in its totality. In order to convict there must be no reasonable doubt that the evidence implicating him is true...the correct approach is to consider the alibi in light of the totality of the evidence in the case and the courts impression of the witnesses...it is acceptable in totality in evaluating the evidence to consider the inherent probabilities...The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused’s guilt.”

130. It was however appreciated in R. v. Sukha Singh s/o Wazir Singh & Others (1939) 6 EACA 145, the former Court of Appeal for Eastern Africa upheld a decision of the High Court in which it was stated:

"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped."

131. In Festo Androa Asenua vs. Uganda, Cr. App. No. 1 of 1998 the Court made the following:

“We should point out that in our experience in Criminal proceedings in this Country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK statute cited above, such belated disclosure must go to the credibility of the defence.”

132. In this case, however, the appellant not only testified to his whereabouts on the night of the incident, but called a witness who corroborated his evidence. In my view, this was a clear case in which the Respondent ought to have taken advantage of the provisions of section 309 of the *Criminal Procedure Code* which provides as follows:

If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.

133. In the case of Adedeji vs. The State {1971} 1 All N.L.R 75 it was held that:-

“failure by the police to investigate and check the reliability of alibi would raise reasonable doubt in the mind of the tribunal and lead to the quashing of a conviction imposed.”

134. In this case, the circumstantial evidence relating to the use of the stolen phone by the Appellant was explained by the Appellant who testified that he was not in possession of the said phone at the time it was being used. Having considered the evidence on this issue I am unable to conclude that the inculpatory facts are so incompatible with innocence of the Appellant and are incapable of explanation upon any other hypothesis than that of guilt. The Appellant offered an explanation which if true may well have exonerated him from the offence in question.

135. Before concluding this matter, I noticed that the 2 accused persons were given different sentences. In Marando vs. The Republic [1980] KLR 114, the Court of Appeal held that:

“The appeal against sentence causes us much concern. When two or more people are convicted of the same offence, it is wrong in principle to impose different sentences except for good reason. For instance, one may have a bad record, but that is not the case here. The appellant is a first offender. The judge gave no reason for sentencing the appellant to four years, and his co-accused to one day’s imprisonment. The only difference we can see between the two cases is that it was the appellant who raised the hue and cry against the deceased. We do not think that he did so maliciously, but rather out of misplaced and misguided zeal. It was a foolish and unnecessary act on his part, but probably well intentioned, as he freely went to report what had happened to the police. In the words of Hilbery, J in R vs. Ball (1951) 35 Cr App Rep 164, 165:

‘The differentiation in treatment is justified if the court, in considering the public interest, has regard to the differences in the characters and antecedents of the two convicted men and discriminates between them because of those differences.’

We see no justification for the disparity in the sentences in this case. If the sentence passed on the appellant is allowed to stand, he will suffer a justifiable feeling that he has been a victim of injustice.”

136. In this case the trial court justified the differentiation in sentencing on the ground that it was the Appellant who pulled the trigger that killed the deceased. I have carefully gone through the evidence and what comes out is that it cannot be stated with certainty who pulled the trigger. There was, therefore, no basis upon which that differentiation was arrived at.

137. I have considered the totality of the evidence adduced before the trial court, subjected it to a re-evaluation and it is my finding that the conviction of the appellant was unsafe. In the premises this appeal succeeds, his conviction is set aside and the sentence against him quashed. He is set at liberty unless otherwise lawfully held.

138. It is so ordered.

JUDGEMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 2ND DAY OF NOVEMBER, 2021

G V ODUNGA

JUDGE

In the presence of:

Mr. Musya for Mr Mutavi for the Appellant

Mr Ngetich for the Respondent

CA Susan