



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL APPEAL NO. 15 OF 2020**

**JEREMIAH GITONGA BASKWANI.....1<sup>ST</sup> APPELLANT**

**LENOX MWIRIGI JACOB.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the original conviction of the Senior Resident Magistrate's Court***

***at Maua in Criminal Case No.507 of 2015 delivered on 23<sup>rd</sup> January 2020***

***by Hon. A. G. Munene SRM)***

**JUDGMENT**

1. The two Appellants, Jeremiah Gitonga Baskwani and Lenox Mwirigi Jacob together with 2 others were jointly charged and convicted for the offence of 'Robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code' as per Count II of the charge sheet in Maua Criminal Case No. 507 of 2015.

2. The particulars of offence were as follows: -

***'On 28<sup>th</sup> January 2015 at Nkandone, jointly with others not before Court, while armed with dangerous weapons namely rifles robbed Juliano Kabarua of his motor cycle KMDf 040S make Tiger valued at Ksh 88,000/= and immediately after the time of such robbery threatened to use actual violence to the said Juliano Kabarua.'***

3. Both Appellants pleaded not guilty and were placed on their defence with respect to the above stated Count II but they were acquitted for Count I, III and IV.

4. By Judgment delivered on 23<sup>rd</sup> January 2020, the trial Court, Hon. A. G. Munene, SRM convicted both Appellants for Count II and sentenced each of them to serve 10 years imprisonment.

***The Appeal***

5. Being dissatisfied with both the Judgement and the Sentence meted by the trial Court, they have preferred the instant joint appeal raising the following grounds of appeal: -

***i) THAT the learned trial Magistrate erred in fact and law in finding that the evidence of identification by recognition by the prosecution witnesses was conclusive yet the conditions for identification were unfavourable.***

***ii) THAT the learned trial magistrate erred in law and fact in analyzing and/or evaluating the Prosecution's evidence separately, forming a considered opinion/impression thereof and then laying the burden of disproving and/or dispelling the pre-meditated impression upon the Appellants contrary to the established principle in criminal law, which casts the burden of proof upon the Prosecution.***

***iii) THAT the learned trial magistrate erred in law and fact in finding and/or holding that the Appellants never attempted to***

*exonerate themselves while the opposite is true and without assigning any credible and/or plausible reason and/or basis for such finding.*

*iv) THAT the learned trial magistrate failed to approach the judgment of the Appellants with an impartial judicial mind and hence the failure to take cognizance of the material discrepancies apparent in the evidence tendered by the Prosecution witnesses.*

*v) THAT the learned trial magistrate erred both in law and fact by finding the Appellants guilty of the offence of robbery with violence whereas the weapon used in commission of the offence was never produced in court.*

*vi) THAT the learned trial magistrate erred both in law and fact by conducting trial and/or convicting the Appellants without legal representation on a capital offence.*

*vii) THAT the learned trial magistrate erred in law and fact in making a finding that the Prosecution had established guilt against the Appellants to the required standard of beyond any reasonable doubt when the Prosecution's evidence was insufficient to sustain a conviction.*

*viii) THAT the sentence of the learned trial magistrate is excessive.*

### ***Appellant's Submissions***

6. The appeal was canvassed by way of written submissions. The Appellants filed submissions dated 19<sup>th</sup> August 2020. On ground 1 of the appeal, they urge that a court has to be careful in considering evidence of recognition. They cite the Court of Appeal case of *Nzaro vs Republic* (1991) KAR 212, where it was held that evidence of identification by recognition at night must be absolutely watertight to justify conviction. They urge the Court to consider whether the moonlight at 3.00 a.m was sufficient to identify them and whether in the midst of the struggle in darkness, the complainant could reasonably identify them. Citing the case of *Hassan Abdallah Mohammed vs Republic* [2017] eKLR, they urge that visual identification in criminal cases can cause miscarriage of justice and should be carefully tested. They urge that even the most honest of witnesses can be mistaken when it comes to identification as was stated in the case of *Kamau vs Republic* (1975) EA 139 and that in light of this, conviction on evidence of recognition or identification should only ensue when there is no room for doubt. They urge that the evidence must be beyond speculation or assumption and must positively and irresistibly point to the accused as the culprit. They cite the case of *Cleophas Otieno Wamunga vs Republic* (1989) KLR 424. They further cite the case of *R vs Turnbull* (1976) 3 ALL ER 549 at page 552. They urge that the trial Court erred in convicting them as the Prosecution did not secure sufficient evidence to prove that the Appellants were the attackers as the complainants could not have possibly been able to identify the attackers as the alleged offense took place in the morning at around 4.00 a.m when it was pitch dark. They further urge that no full moon was reported on that particular night by any of the witnesses hence it is only reasonable to conclude that the visibility level was poor at that time. They urge that PW1 testified that he did not get out of his house which would mean he watched the occurrence of the night from a distance through a window and that these circumstances were unfavourable for proper identification. They again cite *R vs Turnbull & Others* (1976) 3 ALL ER 549 for the factors to be considered with respect to recognition. They urge that despite the fact that PW3 testified that he used to know the 1<sup>st</sup> Appellant, there was need for him to mention his name to the police, a fact which he did not until the Appellants were identified. They urge that this omission clearly shows that the said witness was not sure of the identity of the assailant. They further urge that the manner in which they were identified raises a lot of doubts and that the Court erred in fact and law in finding that the evidence of identification by recognition by prosecution witnesses was conclusive yet the conditions for identification were unfavourable.

7. On grounds 2, 3 and 4 of the Petition of Appeal, citing Article 50 of the Constitution of Kenya, 2010 and *R.T. Bhatt vs Republic* (1957) EA 332-335 they urge that the burden of proof in criminal cases entirely lies with the Prosecution to prove its case against the Accused throughout the trial and the burden does not shift to the accused. They submit that in this instant case, the Prosecution shifted the burden of proof to them, which action is unlawful. They urge that the trial Court erred in laying the burden of disproving and/or dispelling the pre-meditated impression upon the Appellants contrary to the established principle in criminal law, which casts the burden of proof upon the Prosecution.

8. On ground 5 of the Petition of Appeal, they urge that the weapon which was alleged to have been used in the robbery was neither recovered nor produced by the Prosecution during trial hence failing to make available material evidence in support of its case.

9. On ground 6 of the Petition of Appeal, they submit that they were not provided with a Counsel whereas they are laymen and they were facing charges on a capital offence. They urge that were very young adults and it was imperative that they be provided with legal representation to enable them understand the gravity of the charges facing them. They cite Article 48 of the Constitution on access to justice for all and Article 50 (2) (h) on the right to a fair trial including the right to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly. They further cite the case of *Pett vs Greyhound Racing Association*, (1968) 2 All E.R 545, at 549. They urge that the right to legal representation is necessary where an accused person would suffer substantial injustice if it is not provided. They urge that without legal expertise, they did not have the capacity to defend themselves or to discern legal points in their favour or legal weaknesses in the Prosecution case, matters that would have easily been discernible to a counsel. They urge that they were at a disadvantage as they were not able to cross-examine, or argue points of law or even understand the law and rules of evidence, to their detriment. They further cite the case of *David Njoroge Macharia vs Republic* (2011) eKLR. They urge that as they were facing a capital offence under Section 296 (2) of the Penal Code, substantial injustice was occasioned to them since they were not afforded legal representation.

10. On grounds 7 and 8 of the Petition of Appeal, they urge that the trial Court erred in law and fact by finding that the Prosecution had established its case beyond reasonable doubt, putting the appellants on their defence and convicting them.

### ***Prosecution's Submissions***

11. The Prosecution filed submissions dated 15<sup>th</sup> September 2021. They cite the case of *Oluoch vs Republic* [1985] KLR and *Joseph Njuguna Mwaura & 2 others v Republic* [2013] eKLR for the ingredients of the offence of robbery with violence which they urge include when either the offender is armed with a dangerous weapon, is in the company of others or if he uses any personal violence to any person.

12. They urge that it was proved that the Appellants were armed with dangerous and offensive weapon as PW1 testified that the robbers came at around 4:00 am and that he got out of the house and saw they were armed with guns. That PW1 testified that he called Joseph Ntoimunya a police reservist who informed him that the robbers opened fire on him. That PW1 also confirmed that he heard the gunshots. They urge that this was corroborated by PW4 the police reservist who in his testimony confirmed that gunshots were fired. That PW2 testified that at about 15 minutes to six, he received a call to go and pick one Ntoikambi to take him to grazing field and that he went to the main road and parked the motorcycle. That he further stated that while he was here the Appellants came with 3 motorcycles and that when they got to where he was they said "take even this" and that they were armed with guns and they took his motor cycle.

13. On the second ingredient, that the offender is in company with one or more persons, they urge that PW2 in his testimony testified that he saw the Appellants in company of two persons who came and took his motorcycle. That his evidence was supported by PW1 who also testified that he saw five robbers taking his motorcycle. On whether the Appellants were identified, they cite the case of *R vs Turnbull & Others* (1976) 3 ALL ER 549 for the factors that must always be borne in mind when a court is dealing with the question of identification. They urge that PW1, testified that he indeed saw the Appellants and that they were armed with guns and that there was electricity light outside enabling him to see the Appellants clearly. They urge that PW2 testified that he saw the Appellants as they were taking his motorcycle as it was about day time.

14. They cite the definition of possession under Section 4 (a) of the Penal Code. They further cite the case of *Kinyatti v Republic* [1984] eKLR and *Eric Otieno Arum v Republic*, Kisumu CA Criminal Appeal No. 85 of 2005 [2006] eKLR, for instances when the doctrine of recent possession applies. They urge that PW1 testified that it was the 2<sup>nd</sup> Appellant who was found with his motorcycle and that PW4 testified that it was the 1<sup>st</sup> Appellant who was found with his motorcycle. They urge that once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for the possession and that explanation need only be a plausible. They cite *Malingi vs Republic* [1988] KLR 225 and *Paul Mwita Robi v Republic* KSM Criminal Appeal No. 200 of 2008. They urge that the Appellants did not offer an explanation of how they got the motorcycles.

15. They urge that the Prosecution did prove its case beyond reasonable doubt against the Appellants and they urge the Court to uphold the conviction and sentence of the trial court.

#### ***Evidence at the trial Court***

16. In a first appeal, the Court is enjoined to consider both issues of law and fact and make its own independent findings, bearing in mind that it is the trial Court that had the benefit of observing the demeanour of the witnesses. See *Okeno v Republic (1972) EA 32*. The evidence adduced at the trial Court is reproduced hereunder: -

#### ***Prosecution's Case***

##### ***PW1***

17. PW1 testified as follows: -

***“Am Peter Kalabai. Am from Kaelo. I operate a boda boda. My motor cycle is KMDC 310 U. On 28/01/2015 I was at Kaelo. It was around 4:00 a.m. I was asleep in the house. Robbers came in the plot and took 2 motorcycles. They were about 5 robbers. They came using the front gate. I had parked the motor cycle beside the main door of my house. I got out of the house. I saw they were armed with guns. I went back to the house. There was electricity light outside. I called Abdi an AP Police Officer. I informed him that robbers came and stole motor cycle. The camp is on the other side of the plot. The said officer informed me on phone that the robbers opened fire on him and that they went with the motor cycle. I also heard the gunshots. The officer advised me due to the fact the robbers were armed it was not safe to pursue them. He advised me to follow the robbers in the morning. In the morning, in company of Mwirigi whose motor cycle had also been stolen we decided to go to Mutuati where we thought the motor cycles had been taken. At Mutuati we entered into another hotel which had been opened, we informed the owner that our motor cycles had been stolen. He told us he saw the motor cycles. While we were still there, one person called Mati came. He also said his motor cycle was stolen in the night. While still there one Mwenda came and also told us that his motor cycle had also been stolen. The 4 of us in company of other friends we decided to look for the motorcycles. We proceeded to look for the motor cycles and we used Mburu Njiru Primary School. We met with one Murangiri. We explained to him that our motor cycles had been stolen. We were near the school gate. The pupils could hear what we were saying. They told us that they had seen a motor cycle near a trench when they were reporting for school. They later told us that one Jeremiah and Muthomi took the motor cycle. We started asking the whereabouts of the Jeremiah and Muthomi. One of the elders who was there said he could show us Muthomi's place. We went to Muthomi's place. We found his parents. The father called Muthomi. Muthomi said one Jeremiah gave him the motor cycle to take to one Robert Kariti's place. Muthomi and his father said they would take us to Jeremiah's place. On the way to Jeremiah's place we met Jeremiah with the motor cycle. Jeremiah rode away with the motor cycle. It belonged to Mati. I cannot recall the registration number. We managed to get with the help of members of public. We called OCPD Mutuati area. He sent a landrover. Jeremiah and Muthomi were arrested and taken to Mutuati Police. We again proceeded in company of police to Robert Kariti's place. We saw tyre marks on the ground. The motor cycles were not there. Members of the public told us the motor cycle had been taken away and showed us the direction. We did not further pursue the direction. We went back to Mutuati Police Station. The following day an informer told us that the motor cycle had been hidden in Robert Kariti's farm. We went to Kariti's farm. We found tyre marks on the farm but the motor cycles were not there. I was later called by the OCS Mutuati Police Station and informed me that the motor cycle had been found at Robert Kariti's land and that it was my motor cycle which was found. I advised the OCS as I was far to take the motor cycle and then detain the person who had. The same day on 08/02/2015 I went to the station and found my motor cycle. We later recorded statements. Jeremiah was***

arrested on 28/01/2015 by Kesesi. Jeremiah is 1<sup>st</sup> accused. Mwirigi is the one found with my motor cycle. He is the 2<sup>nd</sup> accused. The 3<sup>rd</sup> accused was arrested by police officers but I have no information about him. My motor cycle is KMDC 3IOU. The photos of the same are before the court. MFI - Ia- Id. The value of the motor cycle was 88,000/=.”

Cross examination by 1<sup>st</sup> accused

“I know you. I don't know the job you do. My place and your place is far apart. School children mentioned you. You were found with Mati's motor cycle. The motor cycle was taken to station. It is not before the court. The person who connected you to the offence was also a suspect and he ran away. You had given the motor cycle to Muthomi. The pupils are not witnesses in this court. We saw you with Mati's motor cycle.”

Cross examination by 2<sup>nd</sup> accused

“I know you but I got to know you at the station. I came to the station and I found my motor cycle. I was told you are the one who had my motor cycle. Pictures of my motor cycle have been produced. I was told to record statement.”

Cross examination by 3<sup>rd</sup> accused

“I came to know you in Court.”

PW2

18. PW2 testified as follows: -

“Am Juliano Kabarua. Am from Mutuati. I operate boda boda. My motor cycle is KMDF 040S. It is Tiger make. It is valued at Ksh 84,000/=. On 28/01/2015 it was around 15 minutes to six. One Ntoikambu called me to take him to grazing field. When I went to the main road, I parked the motor cycle to go and call him. I went and called him and then returned to where I had parked the motor cycle. While I was there the 1<sup>st</sup> accused Jeremiah, Lennox 2<sup>nd</sup> accused and another person who is not in the dock and Gerald the 3<sup>rd</sup> accused came with 3 motor cycles carrying each other. When they got where I was, they said "take even this." They were armed with guns. They took my motor cycle and went with it. I called the owner of the motor cycle Kaenga and informed him. We started pursuing them. We were with the said owner. We went to one Robert's place. Robert came out armed with a panga assaulted us and even took my money. We ran away. I went to Mutuati Hospital. I was treated and discharged. We later met Mati, Mwirigi and Kalabai who said their motor cycles had been stolen. We met them outside the hospital. I later made a report at Mutuati Police Station. I later heard that the motor cycle had been recovered. My motor cycle was not recovered. I saw the 3 accused. There was light as it was about to be daytime. I used to know the 1<sup>st</sup> accused. We used to work with him in boda boda section. The 2<sup>nd</sup> accused also used to be a rider. The 3<sup>rd</sup> accused I used to see him in a certain hotel. I have the motor cycle purchase receipt. Receipt - MFI - 2. I don't know where the weapons went.”

Cross examination by 1<sup>st</sup> accused.

My motor cycle is KMDF 040S. You were armed and you were on one of the motorcylces. It was 15 minutes to six.

Cross examination by 2<sup>nd</sup> accused.

“We used to be riders with you in the same stage. We used to be in Kabachi stage with you. My motor cycle was stolen some minutes to six. 4 robbers took my motor cycle. They already had 3. 1<sup>st</sup> accused had a gun. You rode one of the motor cycles. I was left behind with the motor cycle. I had parked the motor cycle waiting for a customer. The area was tarmac area. I parked the motor cycle about 50 metres from the customers place. After the incident, I called the owner of the motor cycle and informed him about the motor cycle. Very few people were on the road. I asked some motorists whether they had seen the motor cycle. I went towards the market area where the motor cycle was taken to. I was on Laare road. You had come from Kaelo direction towards Mutuati. We pursued the motor cycle and went to Robert's place. I was not present when you were arrested. I followed the tyre marks. It was early in the morning and not many motor cycles had used the road.”

Cross examination by 3<sup>rd</sup> accused.

“I used to see you in Amwathi Hotel in Kabachi. The hotel is the one in Amwathi. I made a report at Mutuati Police Station. I told police that Jeremiah, Lenox, Gerald and another stole my motor cycle. I gave the name of Gerald Kimathi. I said Gerald Kimathi, Tiger motor cycle red. The motor cycle was not found. I saw you when my motor cycle was stolen.”

PW3

19. PW3 testified as follows” –

“Am Julius Mwirigi. Am from Kaelo. I operate a boda boda. My motor cycle which was stolen is KMDJ 768J. It is Tiger make.

The value is Ksh 85,000/=. On 28/01/2015 I was in my house sleeping at Kaelo. Around 4:00 a.m robbers came and stole the motor cycle. Lenox, Jeremiah and Gerald came and stole the motor cycle. The 2 motor cycles were parked outside the house. The other motor cycle belonged to PW1. We used to live in the same plot with PW1. 3<sup>rd</sup> accused and accused used to live in one plot. Accused 3 went out and later motor cycle was stolen. Robbers came and stole the motor cycle. I told motorcycle had been stolen. There was light in the plot. I did not recognize them on the material date. Later police said the robbers were armed and ran towards Mutuati area. I called Mati so that we could pursue the motor cycles. We went to Mutuati area. We met with Mwenda. He told us his motor cycle had been stolen. We later found a pupil called Cyprian Muthomi, he told us that he had seen one person with a motor cycle. Later Jeremiah came riding Mati's motor cycle. We arrested him and he said the other motor cycle had been taken to Jeremiah's home. 2<sup>nd</sup> accused was later arrested with poster's motor cycle. My motor cycle was not found. I recorded my statement at Mutuati. I only knew the 3<sup>rd</sup> accused Gerald Kimathi.”

Cross examination by 1<sup>st</sup> accused.

“I did not know you before the offence. My motor cycle was not recovered from you. You were found with Mati's exhibit. You were found in possession of PW I's motor cycle”

Cross examination by 2<sup>nd</sup> accused.

“I did not know you before the incident. My motor cycle and PW1's motor cycle were together when they were stolen. We started looking for the motor cycle after they were stolen. I called Mati to assist me in looking for the motor cycle. We were told by police officers that motor cycles were taken towards Mutuati Police Station. You were found in possession of PW1's motor cycle.”

Cross examination by 3<sup>rd</sup> accused.

“I know you. You are Kimathi. One Muthomi said it's you he had seen with motor cycle and he had to investigate. We did not arrest you with anything. I said that Gerald opened the gate for the thugs (referred to his statement and there is no such vindication).”

PW4

20. PW4 testified as follows: -

“Am Joseph Ntoimunya. Am from Antuambui. Am a police reservist. I have been as such for 10 years. On 28/02/2015 one Julius Mwirigi called me and told me he had been attacked by thieves. I called the police who are near the area. I directed him to where people had been attacked i.e. Kaelo market. The police did not find anyone on the scene. Gunshots were fired. On the scene police were told motorcycle had been stolen. I later went to the scene which was a plot. I was told motor cycle i.e. 2 of the motor cycles were stolen. My motor cycle had earlier been stolen before this day. He took a motorcycle to Nganga forest in Mutuati but we were not successful. I later received a call from a person called Juliano Kabarua to the effect that his motor cycle was also stolen on that day. He was in hospital. i.e. Mutuati Health Centre. We went to the said hospital. He said that people in motor cycle met him in his motorcycle stopped him and said "tuchukue hata hii". There commander of the said people had a gun and cocked it and the said person released the motorcycle. My motor cycle had been stolen on 25/01/2015 at Laare stage. We found 1<sup>st</sup> accused with the said motorcycle. We were referred to 2<sup>nd</sup> accused by some school children and the 2<sup>nd</sup> accused stated that the motor cycle he had was taken by 1<sup>st</sup> accused and another person Robert Kariti. While we were talking with Muthomi 1<sup>st</sup> accused came in motor cycle and the said Muthomi said he was the person who had taken the motor cycle. He stopped him i.e. 1<sup>st</sup> accused, he made away but he later dropped the motor cycle and ran away. We physically pursued him and we got him and detained him with Cyprian Muthomi. We took the motor cycle and went to Mutuati police post by then. The photo of my motorcycle are before the court. Photo MFI - 3a - 3(d). It was registration No. KMDJ 304K red in colour tiger. I had bought at Ksh 94,000/=. The same had not been transferred into my name. I have logbook. Log book MFI - 4. The motorcycle is at the police station. I only used to know the 4<sup>th</sup> accused i.e. Gerald Kimathi. He was a neighbour in the plot. I did not know the others before.”

Cross examination by 1<sup>st</sup> accused

“I have the logbook of the motorcycle. The motor cycle is at the police station.”

Cross examination by 2<sup>nd</sup> accused

“I did not know you before. You were arrested with pastor's motor cycle.”

Cross examination by 4<sup>th</sup> accused

“I used to know you. We used to stay in one plot. We stayed with you in the said plot for 3 years. You disappeared after the theft. We were told you opened the gate for the robbers. I did not find you with anything. 2<sup>nd</sup> accused said that you are the one who opened the gate for them. That is the information which I received. I am a miraa business person and in 2013 I was still dealing with miraa.”

21. PW5 testified as follows: -

*“Am No. 81513 Corporal Alex Kesses. I was previously working at Mutuati Police Station at the material time. Am the investigating officer in this case. On 28/01/2015 at around 11:20 hrs a report was made by one Juliano Kaburia alleging that at around 6:00am while he was at a place called Ngandoni 4 armed people stormed and went away with his motorcycle at the side of the road and went to a homestead of one Kaenga and when he returned he found 4 people armed who confronted him and went with his motor cycle tiger make and fled to Mutuati direction. He picked his friends and traced the alleged robbers past Mutuati area. They followed the tyre marks i.e. fresh tyre marks. At Ngungumi village they found a broken starter and a path leading to homestead of one Robert Karuti. He picked the starter and tried it with ignition key and found it belonged to his motorcycle. They went to the homestead of one Robert Karuti where the road was heading to. He saw 3 motorcycles at the said homestead. He tried to intervene but the said Robert Karuti pursued him using a panga. We went to the subatea but on coming back on the homestead the motorcycles were missing. We then went to Mutuati Police Station and made a report. Later during the day the OCS was contacted via phone from Mutuati patrol base to the effect that 3 people had arrived at the patrol base with 2 suspects and a motorcycle. It was alleged they had been dropped early morning. We went to the post a company of my colleagues and found suspects named Muthomi and Jeremiah. A motorcycle was also there. It was alleged that in the morning robbers stormed their plot and stole 2 motorcycles of one Mwirigi and Karabai. It was further alleged that the suspects said that the motorcycle belonged to Robert Karuti. That they went to the home of Robert Karuti and that on arrival they never found any motorcycle which had earlier been marked but the fresh tyre marks on the scene. That we went to the home of the said Robert and found tyre marks all over the compound i.e. fresh tyre marks upon further search we found part of motorcycle at a shamba adjacent to his house. We interrogated the suspect and one Jeremiah alleged that he parked the motorcycle which he was riding at a farm situated at Mbiriaita village belonging to Robert. We proceeded to the place with his assistance and on arrival at the farm, it was a maize farm and miraa farm. We entered into shamba and saw tyre marks which led to a trench. We found where the motor cycle had been parked due to disturbance of the vegetation in the area but the motorcycle were not there. We followed the tyre marks to Nganga forest. It was dark and as such we went back to the station. We passed by the homestead of Robert Karuti. We alerted the relatives and left our contacts so that they could inform us once they saw the said Robert. The motorcycle was towed from police post to Mutuati Police Station. On 08/02/2015 an informer a relative to the suspect called and alleged that one Lennox Mwirigi was seen hiding a motorcycle at the farm which we had visited.*

*We went and met the informer who accompanied them to the farm and on arrival they found one motorcycle red in colour Yatiang in make which had been reported stolen from one Peter Kalabai. We took the motorcycle to Mutuati Police Station. We picked the suspect Lennox Mwirigi and took him to Mutuati Police Station. We summoned Peter Kalabai to come to the station and identify the motorcycle. He came and identified the said motorcycle. That during interrogation the suspects alleged to have gained entry of the plot at Kaelo marked with the help of Gerald Kimathi a tenant in the plot. A red motorcycle tiger numberless had been recovered. Motorcycle No. KMDC 3 IOU was also recovered. It belonged to Peter Kambai and valued at Kshs. 88,000/=. I have photos. I produce MFI Ia -Id as exhibit 1 (a) — 1 (b), 1c and 1d. The 3<sup>rd</sup> motorcycle recovered was numberless tiger engine No. 161fm513080885 fed in colour. Chassis No. LSRPCKLI 70DA400168. This was recovered. This belonged to one Mati. Mati is also referred to as Joseph M'imunya. The recovered motorcycles were photographed and locked at the exhibit yard. One motorcycle i.e. KMDC 310U was given back to the owner Peter Kalabai. I have exhibit memo for purposes of the photos photographed. I have certificate by the scene of crime officer. I produce the photos as exhibit 3. Exhibit memo form as exhibit 4 and certificate as exhibit 5. Motorcycle KMDF 040S and KMDJ 768J not recovered. The owner of the said motorcycles were Juliana Kaburia and KMDJ 768J belonged to Julius Murithi. They produced sale agreement to prove ownership. I produce them.*

*Sale purchase MCC 1KMDF 040S exhibit 2 and Sale purchase receipt KMDJ 768J exhibit 6.”*

*Cross examination by 1<sup>st</sup> accused*

*“It was alleged that you were found riding the recovered motorcycle. No photos were taken of you riding. No part of motorcycle ie spare was recovered from you. The one recovered from you belonged to Joseph M'imanyara alias Mati. I have produced photos of the same which was recovered.”*

*Cross examination by 3<sup>rd</sup> accused*

*“It was alleged that the motorcycle recovered Atyang make was hidden by you. It is an informer who led us to you. I did not find you where we recovered the motorcycle. The informer is a relative and he knew him well. While we were at the scene the informer received a phone call threatening him not to show the motorcycle allegedly the call was from you. We found you hiding within the compound of Robert Karuti who is a family member. The informer saw you hiding the motor cycle.”*

*Cross examination by 4<sup>th</sup> accused*

*“I did not get you with anything. During investigations I found out that the accused is a tenant of the plot where motorcycles were stolen from and after the incident you were not in your house. After interrogations of the suspect namely Muthomi and Jeremiah they alleged to have stolen the motorcycles with your aid. It is alleged you opened the gate on the material night which is usually locked from the inside. It is investigations which led me to believe the said information.”*

DW1

22. DW1 Gerald Kimathi testified as follows: -

***“Am Gerald Kimathi. Am aware of charges facing me. As per the complainant’s evidence he said he did not know me. He said he only heard about me at the police station. PW2 lied to the court. PW2 said he knew me but as per his statement he did not mention me. I produce the PW2 Statement as D. Exhibit 1. Even PW3 lied. He said that he used to stay in one plot, in his statement he did not say this. I produce his statement i.e. PW3 — D. Exhibit 2. PW4 did not mention me in the 1<sup>st</sup> report or his statement. Investigating officer said that it is accused 1 who led him to me.”***

***Cross examination***

***“PW1, PW2 and PW3 are not my neighbours. I don't know where they live. We are not from the same area with them. I don't know anything about the stolen motorcycles. I don't know any of the accused persons. I even don't know accused 1.”***

***Issues for Determination***

23. Appellant’s grounds of Appeal raise two main issues for determination as follows:-

***i) Whether the Prosecution proved their case beyond reasonable doubt.***

***ii) Whether the Appellant’s rights to legal representation was violated and the consequences of such violation, if any.***

***iii) Whether there is reason to disturb the sentence of the trial Court.***

***i) Whether or not the Prosecution proved their case beyond reasonable doubt.***

24. The necessary ingredients for the offence of ‘Robbery with violence contrary to Section 296 (2) of the Penal Code’ are captured as follows: -

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

25. The Appellants main contention is that they were not identified properly and that the weapons allegedly used during the robbery were not recovered from them.

***Identification of the Appellants***

26. With respect to identification, this Court has taken note of how the robbery is said to have happened. As per the Prosecution’s evidence, 2 of the motor cycles, belonging to PW1 and PW3 were stolen at the same time and the other two at different times on the same day. One of the other 2 motor cycles belongs to PW2, Juliana Kabarua who was the complainant in Count II.

27. PW1, the owner of motor cycle KMDC 310U and PW2, the owner of motor cycle KMDJ 768J testified that on 28<sup>th</sup> January 2015, while at home still sleeping, at around 4:00 a.m, about 5 robbers came to the plot using the front gate and took 2 motorcycles. They testified to have been living in the same plot at the material time. PW1 testified that he got out of the house and saw that the robbers were armed with guns and went back into the house. He also testified that there was electricity lights outside. The Court notes that although it is said there was electricity lights, PW1 did not testify as to having recognized the robbers at the time they came to steal the motor cycles at that 4:00 a.m.

28. This notwithstanding, PW1 testified that while they were in search of the motor cycles, they got information from pupils in a nearby school who informed them that Jeremiah (1<sup>st</sup> Appellant) and Muthomi had taken the motorcycle. That when they went to Muthomi’s house, Muthomi’s father called Muthomi to ask him about the motor cycle and that Muthomi said that it is Jeremiah who had given him the motor cycle. That while on the way to Jeremiah’s place, they met him with the motor cycle belonging to Mati. This evidence was also corroborated by and PW2 and PW3 who confirmed that they met Jeremiah riding Mati’s motor cycle. PW1 testified that later on, he was informed by the OCS Mutuati Police Station that his motor cycle had been found with Mwirigi (2<sup>nd</sup> Appellant).

29. PW2, the complainant in Count II who was a boda boda rider and owner of motor cycle KMDF 040S testified to have been on a trip to pick a customer on 28<sup>th</sup> January 2015 and that while waiting for his said customer, the 1<sup>st</sup> and 2<sup>nd</sup> Appellants and another man came riding 3 motor cycles and took his motor cycle as well. He testified as follows: -

***“On 28/01/2015 it was around 15 minutes to six. One Ntoikambu called me to take him to grazing field. When I went to the main road, I parked the motor cycle to go and call him. I went called him and returned to where I had parked the motor cycle. While I was there the 1<sup>st</sup> accused Jeremiah, Lennox 2<sup>nd</sup> accused and another person who is not in the dock and Gerald the 3<sup>rd</sup> accused came with 3 motor cycles carrying each other. When they got where I was, they said "take even this." They were armed with guns. They took my motor cycle and went with it.***

30. PW2 testified that he used to know the 1<sup>st</sup> and 2<sup>nd</sup> Appellants as they were all boda boda riders operating from the same stage at one point. The Court, therefore, finds that there was direct evidence and specifically that of an eye witness to the effect that the Appellant's stole PW2's motorcycle. The Court finds that PW2's identification of the Appellants was positive because it was based on his personal knowledge and was thus one of recognition.

31. During cross-examination, PW2 testified that he met the 1<sup>st</sup> and 2<sup>nd</sup> Appellants who were coming from Kaelo with the 3 motorcycles. The Court notes that Kaelo is the place where PW1 testified he lives, wherefrom 2 motor cycles belonging to PW1 and PW2 had been stolen, earlier on in the same morning.

32. Further, PW4 testified that his motor cycle KMDJ 304K which had been stolen on 25<sup>th</sup> January 2015 was recovered from the 1<sup>st</sup> Appellant. There is also evidence that the 1<sup>st</sup> Appellant, when met by the police attempted to escape but later on got off the motor cycle and ran away, but was arrested in the process.

33. The Court also considers that the Appellants were found in possession of the stolen motorcycles. The Court considers that when a suspect is found in possession of a stolen item, in the absence of any credible explanation as to how that item came into his possession, a presumption of theft may arise. This was the finding in *R vs Hassani s/o Mohammed* (1948) 15 EACA 121 which was cited with approval by Todd J in *Mathai vs Republic*, Criminal Appeal No. 731 of 1983, (1983) KLR 422, 424, as follows: -

***“On a finding that an accused was in possession of property recently stolen, in the absence of any explanation by him to account for his possession a presumption arises that he was either the thief or the receiver.”***

34. This Court thus finds that the Appellants, who were found with the stolen motorcycles were responsible for the robbery. This Court does not, therefore, agree with the Appellants that the circumstances under which they were identified at 4:00 a.m in the morning supposedly without sufficient lighting is a factor material enough to cast doubt on the Prosecution's case. This is so, firstly, because the charge they were confronted with in Count II was with respect to PW'2 motor cycle and PW2 was an eye witness to the robbery. Secondly, although they were acquitted for the other Counts, this Court finds that the evidence of them being found in possession of the other motor cycles would have been sufficient to link them to the charges.

35. Further, the Court considers that the circumstances under which the Appellants were arrested, with the 1<sup>st</sup> Appellant first attempting to drive off with the motorcycle and thereafter jumping off the motorcycle and running away is indicative of guilt and adds weight to the Prosecution's case.

#### ***Failure to produce weapons***

36. In an attempt to show that the ingredients of robbery with violence were not established by the Prosecution, the Appellants have urged that the weapons allegedly used during the robbery incident were not produced in Court. This Court has confirmed that indeed, the said weapons were not produced. Although the Prosecution eye witnesses testified that the Appellants were armed with guns, no single rifle was produced. The question however is whether the omission to produce the weapon is fatal to the Prosecution's case.

37. To this end, this Courts observes that the ingredients for the offence of robbery with violence are not limited to the aspect of being armed with a dangerous weapon. In addition to the aspect of being armed with a dangerous weapon, the scope of Section 296 (2) of the Penal Code extends to use of violence and the fact of the assailant(s) being in the company of others. The Section uses the term 'or' as opposed to 'and' as follows: -

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

38. In the circumstances, proof of any of the three ingredients is enough to sustain a conviction in a charge for robbery with violence. I respectfully agree with the finding of Ngaah J in *Ephantus Mutahi Karegi v Republic, Criminal Appeal No. 323 of 2007* [2017] eKLR where he held as follows: -

***“any of the three ingredients of the offence of robbery with violence would have been sufficient to establish this offence.”***

39. In the present case, there was evidence by eye witnesses who saw the Appellants armed with guns. Despite the omission to recover and produce the guns, there was also evidence that the Appellants were in the same company and were seen riding the stolen motor cycles together. The fact that the Appellants were two in number already qualifies the ingredient of the offender being in the company of one or more persons.

40. The Court, therefore, finds that the ingredients for the offence of robbery with violence were established and the Prosecution thus proved the charge of Robbery with Violence contrary to Section 295 as read with Section 296 (2) against the Appellants beyond reasonable doubt.

#### ***Whether the Appellant's rights to legal representation was violated and the consequences of such violation, if any.***

41. The Appellant urges that the trial Court proceeded to hear the case and convict them despite them not having had any legal representation for a capital offence. They urge that without legal expertise, they did not have the capacity to defend themselves or to discern legal points in their favour or legal weaknesses in the Prosecution's case and that they were not able to cross-examine, or argue points of law or even understand the law and rules of evidence, to their detriment.

42. The requirement for the state to provide legal representation to an accused person is found in Article 50 (2) (h) of the Constitution which provides as follows: -

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

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

43. The above provision is clear that an accused person will be assigned an advocate if substantial injustice would otherwise result. The Constitution does not define what substantial injustice would entail.

44. In the case of **R v Karisa Chengo & 2 Others**, Supreme Court Petition No. 5 of 2015 (2017) eKLR, the Supreme Court noted that the court exercises discretion in determining whether substantial injustice will result if legal aid is not provided, and there will be instances where the substantial injustice test is not met and legal aid is not provided.

45. The factors to be considered in determining whether substantial injustice would result were discussed in the **Judiciary of Kenya's Criminal Procedure Bench Book**, February 2018 at page 33-34 as follows: -

**48. In determining whether substantial injustice would result, the court must consider the following factors:**

***i) The severity of the charge and sentence;***

***ii) The complexity of the case; and***

***iii) The capacity of the accused to defend themselves (S. 43 (1A) LAA)***

**49. In addition to these factors, the Supreme Court has held that the court should consider the literacy of the accused and whether the accused is a minor.**

46. Although the Court acknowledges the likelihood of persons charged with capital offences suffering substantial injustice if unrepresented, this Court considers that in the present case, the factors contributing to substantial injustice are not present.

47. The Court notes that the Appellants fully participated in the proceedings in the lower Court. They fully exercised their right of cross-examination and they never complained of not being able to understand the proceedings in the lower Court.

48. The court also considers that the accused persons were adults of sound mind and the matter involved was not such a complex one as to render them unable to understand the proceedings. The Court also considers that the Appellants have adequately urged their appeal and they have adequately made representations directly touching on the merits of their case, in a manner that demonstrates their ability to understand the legal principles in issue. In addition, the Court has considered the evidence tendered in the matter as a whole, and the sentence that was meted out against them, which shall be discussed in more detail below.

49. The Court has looked at the authority cited by the Appellant of **David Njoroge Macharia vs Republic (2011) eKLR**. The Court observes that in the said case, O'kubasu, Waki & Visram JJA found that it is not in all instances where legal aid was not provided that the proceedings would be vitiated. I respectfully agree with the finding of the Court which held as follows: -

***“We are of the considered view that in addition to situations where “substantial injustice would otherwise result”, persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re-trial where no such legal representation was provided. The reasons are that, firstly, the provisions of the new Constitution will not apply retroactively, and secondly every case must be decided on its own merit to determine if there was serious prejudice occasioned by reason of such omission.”***

50. This Court finds that the circumstances of this case do not call for a re-trial as the Appellants did not suffer substantial injustice in the failure to be provided with legal counsel.

***Whether there is reason to disturb the sentence of the trial Court.***

51. Both Appellants were sentenced to serve a term 10 years imprisonment. The Appellants have urged in their Petition of Appeal that the said term was excessive. The Court however observes that the penalty section for the offence of robbery with violence attracts the death penalty. This Court also takes judicial notice of the Directions of the Supreme Court of 6<sup>th</sup> July 2021 in **Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)** [2021] eKLR, explaining that the ratio of the decision applied to murder cases only and directing as follows:

***“[15] To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under Section 40 (3), robbery with violence under Section 296 (2), and attempted robbery with violence under Section 297 (2) of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands***

cannot directly be applicable to those cases.”

These Directions are binding on this Court by virtue of Article 163(7) of the Constitution.

52. This Court therefore finds that the Appellants in fact got lenient sentence. The Court also notes that there were aggravating circumstances in the case in that the Appellants were armed with rifles and the value of the items stolen was high. Save for the fact that there is no cross-appeal filed by the Prosecutions seeking an enhancement of the sentence, this Court would have enhanced the same.

53. This Court does not, therefore, find any reason to disturb the sentence meted out by the trial Court.

### **Conclusion**

54. On the morning of 28<sup>th</sup> January 2015, the complainant, PW2, who was a boda boda rider at the time, had gone to pick up a customer of his whom he identified by name as Ntoikambu. The motor cycle in question, **KMDF 040S** belonged to him and this was proven by a receipt which he produced in Court to confirm purchase of the same. He testified that when he got to the pickup point, he parked his motor cycle, went and alerted his customer of his arrival, and walked back to his motor cycle, only to be met by the Appellants who accosted him with rifles. He testified that the Appellants had with them 3 motorcycles and upon sight of his motor cycle, they agreed that they should take his as well and shouted ‘*tuchukue hii pia.*’

55. PW2 testified that the Appellants were coming from Kaleo, which is the same place where PW1 and PW3 testified that their motor cycles were stolen from. There is also evidence that at the time of arresting the Appellants, the 1<sup>st</sup> Appellant who was riding a motor cycle attempted to escape and later on jumped off the motor cycle and ran away.

56. The Court finds that the evidence of PW2, an eye witness, in addition to the circumstantial evidence of the other witnesses was sufficient to link the Appellants to the offence. The Court considers that PW2 testified to know the Appellants as they were all boda boda riders and that he once operated from the same stage with the 1<sup>st</sup> Appellant. The Court is therefore satisfied that his identification of the Appellants was positive.

57. Furthermore, the fact that the stolen items were found in the Appellants’ possession is enough to infer that they were the thieves as per the principle in **Mathai vs Republic**, Criminal Appeal No. 731 of 1983, (1983) KLR 422, 424.

58. The Court rejects the Appellant’s assertion that failure to produce the weapons used during the robbery incident is a factor, material enough to cast doubt upon the Prosecution’s evidence. The Court finds that proof of any of the 3 ingredients under Section 296 (2) is enough to sustain a conviction. In the present case, not only were the Appellants armed, but they were also in the company of more than one. The Court thus finds that all the elements for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code were proven beyond reasonable doubt against the Appellants.

59. With respect to the right to legal representation, the Court finds that the circumstances of the case do not reveal any substantial injustice that was occasioned to the Appellant to warrant a re-trial.

60. As to sentencing, the Court finds that the sentence imposed by the trial Court of 10 years imprisonment for each of the Appellants was in fact lenient, going by the aggravating circumstances of the case, being that the Appellants were armed with a gun and the fact that Section 296 (2) provides for the death penalty.

61. The Court will, therefore, not disturb the finding of the trial Court on sentencing.

### **ORDERS**

62. Accordingly, the Court makes the following orders: -

***i) The Appeal on conviction is declined and the finding of the lower Court on conviction is upheld.***

***ii) The Appeal on sentence is declined and the finding of the lower Court on Sentence is upheld.***

*Order accordingly.*

**DATED AND DELIVERED THIS 4<sup>TH</sup> DAY OF NOVEMBER 2021.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances**

**Jeremiah Gitonga Baskwani the 1<sup>st</sup> Appellant in person.**

**Lenox Mwirigi Jacob the 2<sup>nd</sup> Appellant in person.**

**Ms Nandwa, Prosecution Counsel for the Respondent.**