Mbuthia & another v Republic (Criminal Appeal E010 & E009 of 2021 (Consolidated)) [2021] KEHC 337 (KLR) (18 November 2021) (Judgment)

Neutral citation: [2021] KEHC 337 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E010 & E009 OF 2021 (CONSOLIDATED)

MW MUIGAI, J

NOVEMBER 18, 2021

BETWEEN

ALEX MUTUKU MBUTHIA ..... 1ST APPELLANT

JOSHUA MUEKE ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the conviction and sentence of the Chief Magistrate's court at Mavoko (Hon. H. Onkwani-PM) delivered on 21/12/2020 in Criminal Case No.366 of 2017)

JUDGMENT

Background

1. The 1st and 2nd Appellants were jointly charged before the Chief Magistrate's Courts at Mavoko in Criminal case No. 366 of 2017 with four counts for the offence of Robbery with violence contrary to Section 295 as read with Section 296(2) of the *Penal code*.

Count i

2. On the 28th day of July at Devki area along Mombasa Road in Athi River Sub County within Machakos Count, jointly with others not before court while armed with offensive weapons namely Pistol and sisal rope did rob John Gatiba and FRancis Lemayian Lenkei who was the driver and the conductor respectively of motor vehicle Reg. No. KCA 712T make Toyota Hiace engine No.2KD-1596325 Chassis/ Frame RHD200-0071223 valued at Kshs.2.25 million the property one NGoma Ole Kuchich after the time of such robbery, use actual violence to the said John Gatiba.

Count ii

3. On the 28th day of July at Devki area along Mombasa Road in Athi River Sub County within Machakos Count, jointly with others not before court while armed with offensive weapons namely Pistol and sisal rope did rob John Gatiba one mobile, phone make Infinix valued at Kshs. 8,400 and cash in Mpesa account Kshs. 10,000/- all valued at Kshs.18, 400 after the time of such robbery, used actual violence to the said John Gatiba.

Count iii

4. On the 28th day of July at Devki area along Mombasa Road in Athi River Sub County within Machakos Count, jointly with others not before court while armed with offensive weapons namely Pistol and sisal rope did rob Francis Lemayian Lenkei one mobile phone make Nokia 1110 valued at Kshs.5, 000/- and cash Kshs.5, 000 all valued at Kshs.10, 000/- after the robbery, used actual threats and intimidation to the said Francis Lemayian Lenkei.

Alternative charge

5. Handling robbed motor vehicle contrary to section 322(1) as read with section 322(2) of the Penal code, the particulars of the offence being that-

   Count iv

6. On the 29th day of July 2017 at Loitoktok-Illasit Border area along Emali–Taveta Road in Taveta Sub-County within Kajiado County, otherwise than in the course of robbery, jointly retained one motor vehicle Reg. No. KCA 712T make Toyota Hiace Engine No. 2KD-1596325 Chassis/ Frame KHD200-0071223 valued at Kshs. 2.25 Million the property of Ngomia Ole Kuchich knowingly or having reasons to believe it to be robbed.

7. On 1st August 2017 before Hon. L.Kassan (SPM), the Appellants pleaded not guilty to the charges hence the case proceeded to hearing the prosecution case.

8. In Prosecution case, 8 witnesses testified.

Prosecution

9. The hearing commenced before Hon. L. Kassam SPM; PW1, John Katiba a matatu driver, driver of motor vehicle Reg. KCA 712 T 14 seater matatu, stated that on 28th July 2017 he was in Nairobi at the stage when he was called by a person who told him of some work with World Vision. The work was to transport 14 passengers from Athi River to Namanga at 7.00am. He was to pick them at 6 pm at Athi River to Maili Tisa Namanga. According to PW1, at 8.00 am, the person sent to his phone Kshs.2,000 as a deposit and another Kshs.2,000 at Athi River. In his evidence, PW1 stated that he reached Athi River at 11.00pm. He met the man who had called him. PW1 stated that he went to Kajiado to wait for the passengers at 6.00 pm. He went to Athi River and the man told him to go to Devki to pick the 14 passengers. He stated that at Devki, he waited for the passengers until 7.00pm. PW1 stated that he went to Devki to pick the passengers with their luggage. According to PW1, his turn boy and the man who sent him money accompanied him to Devki. The Mpesa transaction did show the name of the sender. In the vehicle they were 3 persons. He stated that they met a salon car which he knew from Mombasa road which blocked his car on the right side and 6 people got out of the small car armed with pistols. According to PW1, it was around 7.00 pm. He thought they were police officers. They told them to enter the boot of the small car, tied their legs and hands. One of them asked PW1 to show him where the cut out of PW1's motor vehicle. PW1 stated that he walked while his hands were tied and showed him the cut out. He stated that he was returned to the small car. According to PW1, there was light at the place and one could see someone very well. He stated that he saw their faces very well.

10. In his evidence, PW1 stated that the Safaricom print out marked as MF1 show that Kshs. 2000/- had been sent to him by a man called Denis. He stated that he was threatened to give his Mpesa PIN which he gave out. The armed persons drove off with them, they were placed on the floor of the car behind the driver's seat. According to PW1, they were left in a bush in an area called Mutuwani. They had been beaten badly. PW1 stated that his phone make Infinix Note 4 worth kshs. 4,800 and shoes were taken. The receipt was marked as MF2. He showed the court a large scar in his left leg sustained from the beating. He stated that they used a metal to assault him. The police came to help them. His boss Yvonne came to help them. They were picked from the bush and taken to Athi River Health Centre where they were given pain killers. PW1 produced a treatment note dated 29th July 2017 issued at Kajiado as MFI3, a P3 form as MF14, a rope that was used to tie their legs and hands as MFI5.

11. PW1 stated that the people who beat them were in court and pointed the 1st and 2nd Appellant. He stated that the old man 1st Accused hit him on the head and forced him to show him the motor vehicle cut out. It was his testimony that he will never forget his face since he saw him very well on that night. According to PW1, the 2nd accused tied their hands, searched their pockets and removed phones. He stated that it was at 1.00 pm and could remember very well. In his evidence, PW1 stated that he was unable to identify the accused who was brown and had a similar jacket like the one he was wearing in court. According to PW1, the accused was big in size. According to PW1, the 2nd accused was black and small bolded as he looked in court. He stated that the 1st accused was the one who asked PW1 how to start the car. He stated that the incident took 20 minutes. According to PW1, the accused persons were not looking at their faces, the accused persons had pistols and he showed the scar he had as result of the injuries.

12. In his evidence, he stated that he met the man at around 6 to 7 pm. PW1 did not know the man before he met him. He stated that when he met the man when he was with his conductor called Francis who is aware of the incident and how a deal was stuck to go to Namanga. He stated that his conductor used to help him to operate between Kajiado and Kitengela and he is called Francis who could have accompanied them to Namanga.

13. PW1 stated that he could not recall the number plate of the saloon car that it was fun cargo which blocked their matatu and 6 people came out of the car. He stated that he saw them well and counted them. According to him, it was going to 7 pm. He stated that the incident occurred at Devik near the rails, there was light as it had not darkened. In describing the 2nd Accused, he stated that he had dressed like that. He stated that the coat looked like that one. According to PW1, he had a black coat but he was not sure. He admitted that he did not describe how they were dressed in his statement. PW1 produced a P3 form marked as MFI14 and stated that people attacked him. He stated that he was sure of the number of people who attacked them. The 2nd Accused is the one who asked for his phone PIN number and the 2nd Accused spoke in Kiswahili. According to him, in his statement he talked of his PIN number. In his evidence, PW1 stated that the person who tied them is not in court. He stated that he left the 1st accused at the matatu after he showed him the cut out. The 2nd accused told him not to give a wrong PIN number while they were kneeling inside the car. He stated that he was inside the car facing the car rear when he was asked for the PIN number. According to PW1, he did not know the person who was in the saloon car as a driver. In his evidence, he stated that people who were 8 in number sat on them. He stated that he would be able to identify the others if he saw them. The accused punched him on the head but chose not to do anything. He stated that he was injured on the legs and back. According to him, while they were being taken to the bush the people were talking. They were saying that they would kill them but he pleaded with them. According to him, when they were being taken to the small car, the car headlights were on. He stated that it was the 2nd accused who put off the car engine and switched off the headlights. According to PW1, before the headlights were

put off he saw the suspects. He stated that the 1st accused put off the car headlights for him to show him the cut out. He stated that when he alighted the matatu the headlights were on and he was able to see the suspects. According to him, he reported the incident at Athi River police station and to his boss. The police came to his rescue. PW1 denied that he had planned to steal the car and stated that there is evidence that they were robbed. He stated that Namanga hospital was near him. He exhibited treatment notes from Kajiado as MF13. PW1 stated that he would be attacked by people he would be able to know. He saw them at Loitoktok police station. According to him, he wrote a statement at Athi River Police Station on 29th at 8.47 am. They went to Namanga at 7 pm on 29th July 2017. They reached Loitoktok at 10.00am. They went to Illasit border on 29th July 2017. He stated that he was not sure what time he reached Loitoktok. The vehicle had been recovered as it had a tracking system. In his evidence, he stated that they had a pliers in the car that was used to tamper with the tracking device. According to PW1, at Devik the car did not take too long.

14. PW2, Francis stated that he was a matatu driver. In his evidence, PW2 stated that on 28th July 2017 at 1pm, he was in Kajiado looking for a job. He met PW1 who asked him if he would be a conductor and he accepted. He stated that PW1 called a person who had told him to wait. He stated that they went to Kitengela to do the job. He sat at the co-driver's seat. PW2 stated that he went to Devik with PW1. It was at Devik that the person who PW1 had called sat where PW2 sat and PW2 went to seat at the back. It was PW2 testimony that the person showed them a murram road. He stated that they drove to that direction but the person told them to return. The road was narrow only for one car. According to PW2, a saloon car came ahead of them and the person told PW1 not to be alarmed because the saloon car was his boss's wife. He stated that he parked off the road. The saloon car came to the side of their car and people alighted armed with guns. PW2 stated that the person seated with him at the back held his back and removed a pistol. He got him out of the car. Another man told him not to do anything but raise hands up. According to PW2, the matatu registration KCA 712T engine was still on. It was a fun cargo. He stated that the matatu engine stopped and they tried to start it in vain. The thugs forced PW1 to show them where the cut out was fixed. PW2 said they were tied using ropes. He stated that the saloon car left. They were told not to look out. PW2 stated that his coat was removed and covered his face. They were forced to remove phones and money. PW2 stated that his Nokia phone was taken whereby he had them talking to those who had taken the matatu. They beat them and held pistols which they used to hit them. They told them not to look up. He stated that they were removed out of the car and left. According to PW2, they kept on threatening them. He stated that they were thrown behind a tree, untied their hands and tied them on that tree. PW2 stated that his face was covered with his coat. It was PW2 testimony that when the thugs left, the saw a motor cycle rider who assisted them with a phone to call and took them to town. PW2 stated that using the phone he talked to Peter. PW1 had been badly injured. According to PW2, PW1 had been threatened of being killed. PW2 stated that they were picked at 2 pm and were told that the car (matatu) had been found with two people. According to PW2, the GPRS TV scan of 32 inches and CCTV had been removed. He stated that the suspects had been arrested whom he was able to identify the two suspects who had come out of the car. PW2 pointed the rope and pliers and stated that they were used by the suspects. He stated that the pliers was not owned by them. He saw the pliers at Illasit police station. He exhibited the photographs showing the car, radio, CCTV and black speaker as MF1.

15. According to PW2, they reached Devik at 6 am and at round 7 pm they were to pick the person who had given PW1 the job. At a murrum road 20 metres from the road, 6 people alighted from the small car and were also in the matatu. According to PW2, he saw the 2 accused person very well. He stated the two accused had not covered themselves. According to PW2 it was not very dark and there was light. The car headlights were on. In his evidence, PW2 stated that the man who hit him with a pistol was not in court. According to PW2, he was able to identify the accused person because of the light.

He stated that he saw the old man (1st Accused) who alighted from the back and came infront. In his evidence PW2 stated that he did not see the 2nd accused person. He stated that he is the one who called Peter 0721733451 when they were rescued. Peter was a driver of a similar car. He stated that he had not seen the accused person before the incident.

16. According to PW2, vehicles on the narrow road cannot pass each other. He did not know the registration of the saloon car which came from the opposite direction. The small car headlights were on and so they did not think of checking its number plate. The road was narrow and so they parked off the road. The saloon car came near their car and blocked them at the bumper. The saloon car was right ahead behind the driver's side. According to PW2, he was at the middle behind the driver. In his evidence PW2, stated that the people from the saloon car opened all doors and alighted and removed PW1 first. According to PW2, their matatu was still on but the small car headlights were off. He stated that all the people from the saloon car came to the driver's side. According to PW2, he was removed by the person seated next to him. According to PW2, on the driver's side a man alighted and behind the driver, the accused alighted. He stated that the accused is in court. According to PW2, he was sandwiched between the drivers of the matatu. He stated that he was not seated behind the driver. In his evidence, he stated that the man who was seated behind them had a pistol while the one seated with him and PW1 forced him out via the driver's seat. He stated that he was shocked. He did not see other people. He did not see the 2nd accused person neither could he recall how the 1st accused person was dressed. He then stated that he saw the 1st accused person alighting. He stated that he did not describe the suspects to the police. He stated himself and PW1 were thrown into the saloon car while the others in the small car stepped on them and beat them up.

17. In his evidence, PW2 stated that he was able to confirm the accused at the police station. He stated that he did not see the 1st accused person who had a pistol but the people who came to pick PW1 had a pistol. He stated that the person who tied them was not in court. In his evidence, he stated that he could not hear the 1st accused person speak. In the small car there were 6 people. They were seated between the seats. Three people were with them at the back seat. They beat and stepped on them. According to PW2, it was difficult to identify the suspects. He stated that he did not know the person who stole his phone. According to PW2, the people were asking if they had been warned. He stated that the people communicated with those in the matatu on whether they reached. He stated that the people took his PIN Number. They also checked his phone and also took PW1's phone and PIN Number. In his evidence, PW2 stated that they were driven upto 10.00pm before they were dumped. He stated that he did not know the person who beat him but the person was in the saloon car. He stated that he did not know if John (PW1) could have seen anyone. It was his testimony that it was possible to see the suspect. He stated that they could not see a police station nearby. In his evidence, PW2 stated it was Peter Leyo their friend who called them. According to PW2, the police came to their rescue. He stated that they did not report at the police station. It was his testimony that Peter came with the police and owner of the motor vehicle. He stated that they reported at Illasit. He stated that they told that the car had been found at Illasit. According to PW2, the following day at Illasit, he saw the accused persons and they recorded statements. PW2 stated that he was not injured but PW1 had injuries. According to PW2, he did not see PW1 go to hospital but saw him with drugs, pain killers from a chemist.

18. It was PW2 testimony that before they were put in the small car, the people in the small car were talking in Kamba with those taking the matatu saying 'Mwiva' meaning where are you.

19. PW3, Peter Michael Leiyo, stated that he deals with matatu business. In his evidence, he stated that on 28th July, 2017 he was at work. He stated that at 9pm he called a "please call me" from a new number. He called the number and the voice was unknown to him. He stated that the owner of the phone told him that there were two people who wanted to talk to him. According to PW2, he put through John

Katiba, his driver for 1 ½ years who told him that they had been hijacked, car and phones were stolen. According to PW2, his driver was with Lemayian a conductor. He stated that they said they were in a bush, and that the phone belonged to a Good Samaritan. In his evidence, he stated that he called the owner one Ole Kuchich Ngomia of the hijacked motor vehicle KCA 712T Toyota, a Matatu.

20. PW3 stated that a colleague known as Kinyua called to inform him that he had seen a stolen car in front of him in Sinet location. PW3, told Kinyua to follow the car. He called OCS Namanga who called the OCS in Loitoktok and an ambush was laid for the car. He stated that he was informed that the driver and conductor had been injured. They did not have their phones. He stated that Lemayian had a rope that had been used to tie him.

21. In his evidence PW3, stated that they went to Loitoktok and found their car but some items like screen, CCTV, Radio, speakers and spare tyres were missing. He stated that two people had been arrested and were in court. He stated that he did not know them before.

22. PW4, Ngomeo Ole Kuchich stated that on 28th August, 2017 he was called by his driver called Gatiba via phone from a good Samaritan and informed him that they had been hijacked. He picked the thugs at Athi River who took them to Lukenya, beaten and the car was stolen. Upon the car being stolen he tried to disable the car but realized that the car track had been disengaged. It was his testimony that according to MF1 10 (a) and (b) the track had been removed within less than 20 minutes. According to PW4, the track was removed in Namanga. He stated that he went to Lukenya where they found the conductor and driver who had been injured. In his evidence, he stated that he saw the ropes used to tie them. According to PW3, the car was found in Kimana. He stated that he went to Illasit police station where he found that the screen had been removed, wheel tier, radio CCTV worth kshs.250,000/- although no document was produced to prove the amount of Kshs.250,000/-. MF1 6 shows a vandalized motor vehicle. He stated that he did not know the accused before.

23. In his evidence, PW4 stated that the accused persons were in front of them at Illasit where they were found inside the car. According to PW4, the 1st accused person was driving the car. He stated that he saw the accused with PW3 his driver. According to PW4, his driver had told him that there was an old man and young man who attacked them but that evidence was not in his statement and could not recall if it was there. He stated that there was a rope to tie the luggage. In his evidence, PW4 stated that he reported the case at 9.30 pm in Namanga and he lives in Namanga. He stated that the driver wrote his statement in Athi River. He stated that he could not recall when he wrote his statement but on 29th July 2017 they wrote a statement at Athi River police station (Gatiba).

24. On 29th April, 2019 before Hon. E. Michieka (PM) PW5, PC Cornelius Kibet No. 89310 based at Loitoktok police station stated that on 29th July, 2017 he was at work when he was called by Mr. Njenga who informed him that motor vehicle registration number KCA 712T had been stolen from Athi River and was spotted on its way to Loitoktok. In his evidence, PW5 stated that he went to the road barrier and informed the officers but was told by PC Mwalukumu that the vehicle had already passed. He stated that PC Nzilani ordered him and PC Sagini to give a chase of the motor vehicle.

25. According to PW5, they spotted the car at Illasit and blocked it. The co-driver alighted and ran away. They fired in the air causing the co-driver to stop. According to PW3, PC Sagini had arrested the driver.

    He stated that it was CPL Nzilani who ordered him to give a chase of the motor vehicle together with the police driver Sagini and drove towards Tanzania, on reaching at Illasit town they spotted the motor vehicle and blocked it. He stated that the co-driver alighted and ran away and he gave chase and fired in the air and he arrested the co-driver while PC Sagini arrested the driver. He recovered from them a DL, Mobile phone and handcuff keys. In cross –examination, PW5 stated that he did not lose sight of

the 2nd accused person who started to run. He stated that he did not recover money from the accused persons.

26. In his evidence PW5 stated that he searched the man and found- driving license (MF12), mobile phone (MF1) and from the 2nd accused person a mobile phone and handcuff (MF114). They arrested them and escorted them to Illasit police station. According to PW5, they had arrested them near a petrol station where there was lighting in the area and also from motor vehicles. He stated that the 1st accused told him that he had been contracted to drive to Illasit while the 2nd accused person stated that he was a passenger.

27. PW6, Paul Njenga, Police Officer stated that he was based at Illasit police station. According to him, on 29th July,2017 he was at home but was called by the District OCS Loitoktok who informed him of a stolen motor vehicle KCA 712T that was headed to his town. He stated that he circulated the details of the motor vehicle to his patrol officers who later informed him that the motor vehicle had been intercepted. It was his testimony that he went to scene where he found the officers had arrested two men. He interrogated the two men who informed him that they were a passengers and the driver had ran away.

28. Upon searching the two men, PW5 stated that they recovered phones, DL and handcuff keys from the 2nd accused person. They escorted the two men to Illasit police station and the following day officers from Athi River police station picked the two men.

29. PW7, CPL Fred Too No. 85124 based at Kyumi police station stated that he was the Investigating Officer. In his evidence, PW7 stated that on 23rd July, 2017, they received a letter from Illasit police station. He stated that the motor vehicle was stolen on 27th July, 2017 at Devki area whereby the accused persons with other people lured the driver of motor vehicle KCA 712T Toyota Hiace from Naekana Sacco which plied Nairobi-Namanga Road. The driver got a call and was requested to pick passengers at Devki to Loitoktok on hire at a costs of Kshs.7, 000/-. A deposit of Kshs.2, 000/- was paid to the driver while the balance of Kshs.2, 000/- was to be paid at Vanilla and Kshs.3000/- at Loitoktok. PW7 stated that it was agreed that they meet at Devki at 6 pm whereby they met two passengers who informed them that their colleagues were at Kenani. It was PW7 testimony that while on the way to pick up the others, they came by a fun cargo vehicle that blocked their path and about 6 people alighted from vehicle. The two passengers came out and joined the other, removed the driver and conductor from the van into the fun cargo where they were beaten and tied up. One of the men in the fun cargo had a gun and another demanded to be shown the cut out. According to PW7, John Katiba remembered the man who demanded for the cut out by describing him as an old well-built man. He also saw a slim man get into the van. In his evidence, PW7 stated that there was lighting in the vehicle that enabled them to see them. They were later dragged and dumped in a bush at Lukenya and the fun cargo and van left. They came across a boda boda rider who assisted them with a phone to call the owner of the motor vehicle. The police at Namanga and Loitoktok were informed. According to PW7, the motor vehicle was cited at Sinet area by a Naekana Sacco driver who followed it and informed the police officer.

30. PW7 stated that the motor vehicle was impounded at Loitoktok with two occupants, Joshua Mueke and Alex Mutuku. The motor vehicle had been vandalized whereby the car tracking system and CCTV had been tampered with. A driving license had been recovered from the 1st accused person, a rope, pliers, assorted keys, handcuffs, keys and two phones. He stated that John Katiba was treated at Mavoko Hospital and issued with a P3 Form. According to PW7, John Katiba told him that his infinix phone worth Kshs.8,000/- had been stolen. He was shown a receipt. He was shown the Tracking Certificate exhibit 10(a), Sale Agreement exhibit7, Mpesa Statement(John Katiba) dated 28th July 2017 exhibit 2,Equity Bank statement detailing payment for the motor vehicle exhibit 9, the rope recovered at scene

in Lukenya photographs exhibit 6(a) to (f), rope exhibit 5, Driving licence of Joshua Mueke exhibit 12, pliers exhibit 13 , two phones exhibit 14(a) and (b) and assorted keys exhibit 15.

31. In his evidence PW7, stated that the interrogated the two suspects who gave different accounts as they said they had boarded the motor vehicle.

32. In his evidence, he stated that the people in the fun cargo blocked the van and ordered them out. According to PW7, the 1st accused and 2nd accused were in the van. It was his testimony that the two accused joined the men in the fun cargo from the van and took control of the van. The 1st accused person took control of the van while the 2nd accused sat on the front passengers' seat. According to PW7, the fun cargo approached the van from the opposite direction and blocked it. He stated the 1st accused assaulted the driver while demanding to be shown the van cut out switch as well as the other men. He stated that the headlights were on and there was lighting at the scene. According to PW7, the pistol was not recovered. It was his testimony that the men in the fun cargo tied the driver and conductor. According to PW7, the stolen phones were not recovered since they are not exhibits. The key and pliers were in the motor vehicle. He stated that the 1st and 2nd accused persons were apprehended inside the stolen van and there was no other person.

33. PW8, Dr. Angela Muli stated that she holds a Bachelor's Degree in Medicine from Hanova Germany with 8 years' experience. She stated that she examined John Katiba on 31st July, 2017 and filed a P3 form. According to PW8, in her examination she found a blunt force trauma, sharp force trauma and blunt injury on the left lower limb. She concluded a sharp and blunt weapon was used. She also found signs of having been tied by a rope on his wrist. According to PW8, the injuries were 3 days old. She stated that the marks were on the right hand wrist.

34. The Prosecution counsel closed the prosecution case.

Case to answer

35. Upon considering the evidence of the prosecution witnesses and the defence written submissions, on 21st February, 2020 Hon. E. Michieka (PM) was persuaded that a prima facie case had been established by the prosecution against each Appellant to place them on their defence.

36. Before Hon. H. Onkwani (PM), directions under Section 200(3) of the *Criminal Procedure Code (CPC)* were taken whereby Ms. Jeruto for the 2nd Appellant and Chadianya for the 1st Appellant who agreed to proceed with matter where it had reached.

37. The 1st and 2nd Appellants chose to give a sworn statement and unsworn statement respectively. The 1st Appellant's case was supported by DW3, Avandi Kilonzo.

Defence Case

38. In his evidence, DW1, Joshua Mueke Mutua stated that he lived at Emali. He stated that he was a businessman. According to DW1, on 28th July 2017 he left Emali to Kimana to buy onions and watermelons. He stated that he got to Kimana on 28th July, 2017 and rented a house at Cabanas. He stated that he was given a receipt to show that he had rented the house. The receipt was produced as DEXH 1. In his evidence, he stated that on the following day at 6.00 am, he took mkokoteni to carry his goods but while at Emali-Loitoktok and Taveta stage, he stated that he met a police by the name Kibet who hit him with a blow and arrested him. According to him, the said police asked him what he was doing in the area on the basis that he was not a resident. He stated that the police took his money and all items. According to him, there were passerby who did nothing. He stated that the police shot twice in the air. According to him, the police took his Kshs. 46,300, NSSF, NHIF and his driving license card. In his evidence he stated that he was then taken to Tarakea border police post where he

was locked up with other 4 people in the cell and that they reached at the police station at 9.30 am. In his evidence, DW1 stated that his name in the occurrence book was called out for identification parade and he did not know the reasons for the arrest of the Alex Muthusi(1st Appellant). He stated that he had never seen Alex Muthusi previously. At the identification parade, he stated that no one spoke to them. He stated that he met 4 people at the identification at Mavoko, Athi River Police station but in court he met two. He denied to have committed the offence. According to him, he has never been to Athi River. He did not assault the 1st Complainant and nothing was recovered from him. He was not found with the stolen motor vehicle. He only saw the photos in court. Investigation on his phone were conducted by Safaricom. No identification parade was conducted. He denied the charges and urged the court to dismiss the case.

39. DW2, Alex Mutukue Mbutha (1st Appellant), stated that he knew the charges he was facing. In his evidence, on 28th July, 2017 he woke up at 4.00 am and went to work at Loitoktok in a hotel where I was employed. He stated that between 9 to 10 pm, they closed the shop in the presence of the owners, one Kilonzo and Charles and boarded a motor vehicle to Loitoktok where they spent their night at Illasit town. According to DW2, the next day on 29th July, 2017 they went to the stage together and went to work. It was DW2 testimony, that his boss sent him to pick the hotel keys. He stated that he ran to the hotel which was 50 metres away. In his evidence he stated that he heard a gunshot and saw everyone running. According to him, it was at 4.00am. In his evidence, he stated that a police officer stopped him, he stopped and was arrested. It was his testimony that his boss was watching what was happening and his boss did ask why he was being arrested but the police became violent. He was taken to Illasit police post where he was told to wait since his case was at Athi River. The police took his phone and money. He stated that he could not remember his phone number. According to him, the money taken was Kshs. 5,400/-.

40. According to him, one day later he was called and heard them say 'Ni kama si hawa'. He stated that at an Identification parade the 2nd Appellant was present. According to DW2, it is not true that they stole a motor vehicle from Devik and took it to Loitoktok since no tracking report was availed in court. He saw the complainants at the police station. It is after one day that they were taken at Athi River. According to him, he did not record a statement neither was his employer called to record one. He stated that he was a casual worker at Kwetu Dishes Loitoktok. He denied the charges and stated that he had suffered for three years.

41. In support of DW2 evidence, DW3, Avandi Kilonzo of ID No.110506678 stated that he owns a hotel in Oloitoktok namely Kwetu Dishes. He stated that he resided at Illasit Town. In his evidence, he stated that DW2 was his employee in the year 2017 who started working in May and in July DW2 was arrested. In his evidence, he stated that on the day of the incident between 3 a.m and 4 a.m, they were leaving Illasit to Oloitoktok. He stated that on 29th July 2017, he was in the company of DW2 and another employee and on their way to the stage he realized that he had no hotel keys and sent DW2 to go pick the keys from his room. DW2 ran across the road to pick the keys. According to DW3, a police officer fired in the air and all employees ran in different directions. It was later when they saw DW2 had been arrested by plain clothes policemen. He told the police that DW2 was his employees but police asked him why DW2 was running away. According to DW3, the police officer pushed him away and directed him to Athi River police station. He stated that they went to work. According to DW3, he did not follow up at Athi River police station till July 2020 when he was told to come to court to explain what had transpired that day. In his evidence, DW3 stated that the stage there were 2 matatus and other motor vehicles. According to him, DW2 was his employee for two months.

Trial Court's Judgment

42. In her judgement, the learned trial magistrate was satisfied that PW1 and PW2 saw the Appellants and PW1 was able to describe Appellants despite not recording their description in the statement which the learned trial magistrate held was not fatal to the prosecution case since PW1 had described the Appellants and at the time of the arrest the description matched. The Appellants were found in possession of the motor vehicle and no explanation was given by them on how they came into possession of the vehicle a day after the robbery. According to her, the defence of alibi was a mere denial. The learned trial magistrate found that Count I,II,III succeeded while Count IV collapsed and convicted the Appellants pursuant to Section 215 of the Criminal procedure Code.

43. In mitigation, 2nd Appellant stated that he was 73 years old. He had grandchildren who depended on him hence court should be lenient. The1st Appellant asked for leniency since he was diabetic and had high blood pressure. Upon considering the Appellants mitigation and the fact that the Appellants were first offenders and the stolen items were recovered, guided by the Supreme Court decision of Francis Karioko Muruatetu & another vs. Republic [2017] eKLR the learned trial magistrate sentenced each Appellant to serve 20 years imprisonment.

Appeal

44. Aggrieved by both the conviction and sentence, the Appellants appealed citing the following grounds:-

(1) That the learned trial magistrate convicted and sentenced the Appellant of the offence charged notwithstanding the prosecution failed to prove their case beyond reasonable doubt.

(2) That the trial court convicted and sentenced the Appellant of the offence charged notwithstanding the Appellant's plausible defense was not given due consideration.

(3) That the trial court convicted and sentenced the Appellant of the offence charged notwithstanding the trial court relied on single evidence.

(4) That the trial court relied on prosecution evidence that was riddled with contradictions and discrepancies leading to selective judgment.

(5) That the trial court convicted and sentenced the Appellant of the offence charged notwithstanding the sentenced failed to commensurate the offence charged.

(6) That the trial court convicted and sentenced the Appellant of the offence charged notwithstanding identification relied on was unsafe.

(7) That the trial court convicted and sentenced the Appellant of the offence charged notwithstanding the charge sheet was fatally defective.

(8) That the trial court convicted and sentenced the Appellant of the offence charged notwithstanding the prosecution evidence relied on was in variance with the charges.

(9) That I pray to be furnished with copy of the trial record and judgement to be able to raise more reasonable grounds during the appeal hearing.

45. The Appellants have urged this court to quash the conviction and set aside the sentence.

1ST and 2ND Appellants Submissions

46. On behalf of the Appellants, it is submitted that based on grounds 1,3,4,6 and 8 of the appeal there was no sufficient evidence to convict the Appellants.

47. According to the Appellants, The Appellants submitted that the proceedings and judgment in this matter were handled by 3 different Trial Magistrates, namely Hon L Kassan (SPM) heard PW1-PW4, Hon E Michieka (PM) heard PW5-PW8 and delivered Ruling on a case to answer and Hon H Onkwani (PM) heard the Defense and delivered judgment. The appellants relied on the case-law to buttress the point the learned Trial Magistrate only heard the defence case hence she did not have the benefit of seeing the prosecution witnesses' demeanor or assessing their truthfulness and credibility. According to the Appellants it is desirable that one magistrate hear a criminal case to its conclusion.

48. According to the Appellants, the learned trial magistrate failed to warn herself of the danger of convicting them on the basis of evidence wholly recorded by her predecessors hence occasioning a miscarriage of justice. Reliance is placed on the case of Abdi Adan Mohamed vs. Republic [2017] eKLR and Johannes Amadi vs. Republic [2018] eKLR. According to the Appellant, it is prejudicial.

49. It is submitted that identification parade must precede the dock identification. Reliance is placed on the cases of *Kimotho Kiarie vs. R [1984] eKLR*, *Fredrick Ajode Ajode vs. R [2004]eKLR, John Nduati Ngure vs. R [2016]eKLR* and *Jali Kazungu vs. R [2017]eKLR*.

50. It is submitted that the Appellants were not properly identified since no identification parade was conducted. According to the Appellants since the learned Trial Magistrate was not present in court when the dock identification was conducted, she would not be in a position to tell what manner of clothing the Appellants wore when committing the offence.

51. Further that the learned Trial Magistrate analysis is at variance with the evidence recorded since PW1 stated that he was unable to identify the 1st Appellant who was brown and had a similar jacket like the one he was wearing in court hence not clear where the learned Trial Magistrate got the evidence that the 1st Appellant was wearing a brown jacket similar to the one he was wore in court. According to the Appellants, the learned Trial Magistrate did not hear and record this evidence of PW1 hence not able to tell what the Appellant wore. According to the Appellants, no notes were made in respect of the 1st Appellant's clothing. The Appellants submitted that PW2 was also not sure of the 2nd Appellant's clothes.

52. The Appellants submitted that the inconsistency of identification evidence was also apparent from PW1 evidence that the 2nd Appellant tied his one hand but in cross examination PW1 stated that the person who tied him was not in present. Further from PW2 was that he saw them Appellants very well but went on to state that he did not see the 2nd Appellant. In re-examination, PW2 stated that the person who tied them was not in court, one who asked for their PIN was unknown and the one who hit him was not in court but could be able to identify him. He could not see him. According to the Appellants, it was therefore not possible that PW1 and PW2 saw the Appellants during the robbery. PW2 evidence is clear that he never saw the Appellant. As result then it was imperative to conduct an identification parade. The dock identification by PW1 and PW2 was worthless.

53. The Appellants fault the learned Trial Magistrate for placing reliance on the Appellants description given to PW7 by PW1 and PW2. According to the Appellants, PW7 evidence is contradictory since he cannot say that there was proper identification when he has conceded that there was no identification parade. PW1 and PW2 description of the Appellants should have assisted PW7 to arrange for an identification parade. The description was too broad and general to be attributed to the Appellants to be able to positively identify them.

54. As regards the elements to be established in court to establish the doctrine of recent possession, reliance is placed on the cases of *Isaac Ng'ang'a Kahiga vs. R [2006] eKLR* and in *David Mugo Kimunge vs.R [2015] eKLR*.

55. It is submitted that the Appellants were not arrested inside the stolen motor vehicle since the 2nd Appellant stated that his boss had sent him to pick the hotel keys at a hotel which was 50 meters away when he heard a gunshot and police stopped him and arrested him. According to the Appellants, the first element to establish possession was not satisfied. It is submitted that despite PW5 testifying that a passenger alighted from the stolen motor vehicle and ran away, the Appellants raised a defence of mistaken identity which was corroborated by DW3. According to the Appellants, then an identification parade was necessary. It was stated that the mobile phone exhibited as exhibit 14 was recovered from the Appellant but no triangulation of the mobile phone was done to determine if indeed the Appellant was present at the scene of the robbery.

56. According to the Appellants, the defence of alibi should not be rejected if reasons are not disclosed. Reliance is placed on the case of Kimotho Kiarie vs. R (supra). It is submitted that the 1st Appellant was in the company of DW3 at Illasit town hence not at the scene of the robbery. According to the Appellants, the court cases illustrate that the defence of alibi should not be rejected for undisclosed reasons yet the learned trial magistrate dismissed the defence as a mere denial. According to the Appellant, the learned trial magistrate erred since an alibi defence is specific defence not mere denial. The defence of mistaken identity received no attention from the learned trial magistrate yet it had been corroborated by DW3. The defence was plausible and not unreasonable hence if the learned trial magistrate had given due consideration she would have found the doubts as to the Appellants culpability and acquitted them.

57. It is therefore submitted that the prosecution did not prove the case against the Appellants beyond reasonable doubt hence the conviction should be quashed and Appellants set at liberty.

58. As regards the sentence of 20 years imprisonment meted on each Appellant, it is harsh and excessive in the circumstances. According to the Appellants, they are first offenders and the stolen items were recovered hence the sentence should be set aside and substituted with an appropriate sentence preferably a non-custodial sentence.

Prosecution Submissions

59. Prosecution proposed the issues for determination as follows:-

    a. Whether the conviction was proper?

    b. Whether the sentence was proper?

60. On the first issue, counsel while placing reliance of the case of Johana Ndungu vs R. (Criminal Appeal 116 of 1995) UR submitted that the ingredients of the offence of robbery under Section 296(2) of the Penal Code are that; the accused is armed with any dangerous and/or offensive weapons during the incident; the accused is in the company of more than one or more persons; and the accused threatens to use violence before, during and after the said robbery incident.

61. Counsel submitted that PW1 and PW2 clearly placed the Appellants at the scene of the crime, they clearly identified the Appellants and the Appellants were indeed part of a gang that robbed PW1 and PW2 at gunpoint.

62. According to Counsel, the doctrine of recent possession clearly applies to the Appellants as PW5 and PW6 personally arrested the Appellants in possession of motor vehicle registration number KCA 712T (Toyota Hiace). It is submitted by Counsel that the ingredients of robbery with violence were satisfied.

63. As regards the sentence, it is submitted that it was appropriate. Counsel urged this court to uphold the conviction and sentence.

Determination

64. I have carefully considered the Trial Court evidence on record, Trial Court's Judgment, Memorandum of Appeal and written submissions filed on behalf of the respective parties.

65. This Court being the 1st Appeal Court, its duty is as set out in the case of *Pandya vs. Republic [1957] EA 336* as follows:-

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

66. In the case of *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.

67. The Appellants had been charged with the offence of Robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. The Trial Magistrate found the defence of alibi to be a mere denial hence the Appellants were properly identified by the complainants. According to the Trial Magistrate, the Prosecution proved the case beyond reasonable doubt. To the Appellants, if the defence of alibi was given due consideration, the Trial Magistrate would have found that they were not at the scene of the crime.

Burden Of Proof

68. Article 50 (2) (a) of the Constitution provides that that an accused person is presumed to be innocent until the contrary is proved.

69. It was held by Viscount Sankey L.C in Woolmington vs. DPP [1935] A.C 462 pp. 481 that in criminal cases, the burden of proof lies with the prosecution.

70. As was stated by Nyakundi J. in *Republic vs. Ismail Hussein Ibrahim [2018] eKLR*:-

> " ...the prosecution has the duty to prove all the ingredients of the offence beyond reasonable doubt and there is no burden on the part of the accused to proof his innocence at any one given time. The law only permits very few statutory exceptions where an accused person can be called upon to give an explanation in rebuttal. However, this does not shift the burden of proof from the prosecution"

Standard of Proof

71. According to Lord Denning on what is proof beyond reasonable doubt in *Miller vs. Ministry of Pensions, [1947] 2 ALL ER 372* stated that:-

> " 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."

72. Based on the grounds of appeal, the issues that emerge for determination are as follows:-

a. Whether the Prosecution proved the offence of Robbery with violence to the required standard

b. Whether the evidence of identification sufficiently pointed to the Appellants

c. Whether the prosecution evidence was riddled with material contradictions.

d. Whether the prosecution proved the doctrine of recent possession was proved /applicable in this case.

e. Whether the prosecution disproved defence of alibi pleaded by the Appellants.

f. Whether the Trial Court sentence of 20 years imprisonment to each Appellant failed to commensurate the offence charged.

73. Before the court delves into the determination of the issues above, the court notes that the Appellants contend that it was desirable that the proceedings before the Trial Court ought to have been heard by one magistrate to the conclusion. To the Appellants, the learned Trial Magistrate only heard the defense case hence she did not have the benefit of seeing the prosecution witnesses' demeanor or assessing their truthfulness and credibility. According to the Appellants it is desirable that one Magistrate hears a criminal case to its conclusion.

74. The court's view is that Section 200(3) of the CPC was complied with before the defence case was heard. On 12th October 2018 & 27th November 2018, the 1st Accused person sought to be furnished with copies of typed proceedings Witness Statements and List of Documents to enable him prepare for the Defense as his advocate withdrew from representing him and he undertook to represent himself. Secondly, the matter was now before Hon Agonda (SRM).

75. On 15th September, 2020, the Appellants were represented by Legal Counsel Mr Jeruto & Mr Jadianya whom when Section 200(3) CPC was raised by the Incoming Trial Magistrate Hon H. Okwani (PM) both Counsel informed the Court the matter was to proceed from where it stopped. The appellants were accorded the opportunity to either ask the matter be heard afresh and recall prosecution witnesses but through their advocates, they chose to proceed with case from where it had reached. The Appellants were accorded right to fair trial under Article 50 (1) COK 2010.

In *Abdi Adan Mohamed vs. Republic [2017] eKLR* the Court noted that;

> The succeeding magistrate may act on the recorded evidence. But the succeeding magistrate may also recommence the trial and resummon witnesses. The transition of criminal cases from a magistrate or judge who has ceased to have jurisdiction to the one succeeding him or her remains a matter of concern. Problems are normally encountered in the last scenario where the succeeding Magistrate decides to adopt the evidence recorded by the predecessor or altogether recommence the trial. In that case the Accused may demand that any witness be re- summoned and re-heard and the succeeding Magistrate shall inform the accused person of that right.....

76. The import is that the succeeding Magistrate may continue with the Court proceedings from where the Predecessor left off. However, to do so, Section 200(3) CPC ought to be employed by the Accused person(s) who are explained their right to demand recalling of witnesses and/or where the Court orders hearing to start de novo. In both instances these processes are to ensure that the Accused persons are not prejudiced.

77. In the instant case, the Accused Persons/Appellants were accorded the opportunity to request summoning and recalling of the witnesses under Section 200(3) CPC by the Trial Magistrate Hon H. Okwani (PM) and through their Advocates opted to proceed from where the matter stopped.

78. This Court also notes with concern, that the issue of trial conducted by various Trial Magistrates was not one of the grounds of appeal listed in the Memorandum of Appeal and is raised for the 1st time in the written submissions. The issue is not rightfully one of the grounds of appeal and the Prosecution is prejudiced as it was not accorded its opportunity to respond. This Court finds that the Appellants rights were not vitiated/they were not prejudiced, since they opted to proceed from where the matter stopped. On the other hand the Trial Court was legally entitled to adopt the evidence on record by virtue of Section 34 of *Evidence Act*.

Whether the Prosecution proved the offence of Robbery with violence to the required standard

1. According to the charge sheet, the Appellants were jointly charged for the offence of Robbery with violence pursuant to Section 296 (2) of the Penal Code. Under the provision, it is provided that:-

    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.

2. As read with Section 295 of the Code where 'Robbery' has been defined 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"

79. What constitutes the offence of Robbery with violence was well captured in the case of *Olouch vs. Republic (1985)KLR* where the Court of Appeal stated as follows:-

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

80. In the case of *Dima Denge Dima & Others vs. Republic, Criminal Appeal No. 300 of 2007*,it was stated that:

> " ...The elements of the offence under Section 296 (2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence."

i. The offender is armed with any dangerous and offensive weapon or instrument

81. PW1 and PW2 stated the people who alighted from the saloon car were armed with a pistol. In his evidence PW1 stated that a metal was used to assault him. PW2 stated they were hit using a pistol. PW1 and PW2 stated that they were tied using ropes.

ii. The offender is in company with one or more person or persons

iii. PW1 and PW2 stated that 6 people came out of the saloon car that blocked their motor vehicle. According to PW1 and PW2, there were many people in the saloon car which blocked their motor vehicle. PW1 stated that there was light at the scene of the crime hence he could see the assailants clearly.

iv. The offender wounds, beats, strikes or uses other personal violence to any person

82. According to PW2, PW1 was badly injured. According to PW8, PW1 had sustained blunt trauma and blunt injury on the head. She stated that she filed a P3 Form after examining PW1. PW1stated that he remained with scars as a result of the injuries sustained. According to PW1 and PW2, they were tied with ropes and thrown inside the saloon car where the assailants stepped on them. PW1 and PW2 stated that the assailants issued threats to them and kept on beating them. PW1stated that one of the assailant assaulted him forcing him to show the motor vehicle cut out. PW1 and PW2 stated their hands and legs were tied using a rope.

83. The court is satisfied that the facts are conclusive to constitute an offence of Robbery with violence. PW1 was injured. The assailants who were more than two were armed with pistol. PW1 and PW2 were forced to give their mobile PIN Numbers.

A. Whether the evidence of identification sufficiently pointed to the Appellants

84. It is submitted by the Appellants that they were identified on the dock. According to the Appellants, PW1 and PW2 evidence was inconsistent hence there was need to have an identification parade conducted.

85. Mativo J. in *Donald Atemia Sipendi vs. Republic [2019] eKLR* had this to say:-

> " 33. Our system of justice is deeply concerned that no person who is innocent of a crime ought to be convicted of it. In order to avoid that, a court must consider identification testimony with great care, especially when the only evidence identifying the accused as the perpetrator comes from one witness. Because the law is not so much concerned with the number of witnesses called as with the quality of the testimony given, the law does permit a guilty verdict on the testimony of one witness identifying the accused as the person who committed the crime. A guilty verdict is permitted, however, only if the evidence is of sufficient quality to convince the court beyond a reasonable doubt that all the elements of the crime have been proven and that the identification of the accused is both truthful and accurate..."

86. On identification in *R. vs. Turnbull & Others [1973] 3 AllER 549* it was held 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?"

87. In *Nzaro vs. Republic (1991) KAR 212*, the Court of Appeal held that evidence of identification by recognition at night must be absolutely watertight to justify conviction. See *Francis Kariuki & others Vs. R, CR.A No. 6 of 2001*.

88. The court's view is that there was proper identification of the Appellants due to the following reasons:

i. PW1 stated that there was light and he could see faces of the assailants very well. According to PW1, he saw the suspects before the motor vehicle headlights were put off. PW1 stated that the people who beat them were in court and pointed the 1st and 2nd Appellant. He stated that the 1st accused alighted from the back seat. He only saw the 2nd accused on the day of the attack. He stated the 1st accused person is the one who hit him on the head and forced him to show him the motor vehicle cut out. The 2nd Accused is the one who asked for his phone PIN number. The 2nd accused tied their hands, searched their pockets and removed phones. The 2nd accused put off the car engine and switched

off the headlights. PW2, stated that he saw the 2nd accused person very well. He stated the two accused had not covered themselves. According to PW2 it was not very dark and there was light. The car headlights were on. In re-examination, PW2 stated that he saw the 1st accused alighting from the saloon car. PW2 stated that at the police station he was able to identify the accused persons.

ii. PW1 and PW2 were clear that it was in the saloon car that the assailants alighted from armed with pistols. PW2 stated that the saloon car came to the side of their motor vehicle but 1st accused person told him not to be alarmed since it belonged to his boss wife.

89. The evidence by PW1 is corroborated by PW2 driver and conductor of motor vehicle registration No. KCA 712 T respectively that on 28th July 2017, PW1 was lured to carry passengers and was directed to where they were and they were accosted by 6 -8 people who alighted from the saloon car that blocked their vehicle.

90. PW1& PW2 were bundled out of their vehicle into the saloon car, they were stashed behind the driver's seat and driven off and abandoned in the bush. In the mean-time they were threatened with a pistol, beaten with a metal and tied with ropes. These circumstances depict sufficient time was involved between the Appellants and Witnesses, PW1 & PW2, there was human contact and interaction and they were in close proximity with the Appellants and others not before Court. The appellants spoke to PW1 & PW2, demanding from PW1 the cutout/off switch of the vehicle and PW2 his Mpesa PIN number, they were tied, beaten and their mobile phones and money were confiscated and then they were hurdled in the salon car and they were driven off and later abandoned.

91. From these circumstances, coupled with the fact that where PW1& PW2 went to fetch passengers as had been made to believe, they said there was light and the vehicles had headlights on. Their evidence is corroborated by PW5 & PW.7 who on a tipoff that the vehicle was found, alerted colleagues and gave a chase and arrested the Appellants on recent possession of stolen property, the motor vehicle. The totality of the evidence of identification of Appellants at the scene of crime by PW1 & PW2 and subsequent arrest by PW5 of the Appellants with the motor vehicle sufficiently points to the Appellants.

92. The Court of Appeal in *Samuel Kilonzo Musau vs. Republic [2014]eKLR* thus:

> " The purpose of an identification parade, as explained in Kinyanjui & 2 Others Vs Republic (1989) KLR 60, "is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify, and for a proper record to be made of that event to remove possible later confusion...."

93. The court's view is that the facts clearly establish that the Appellants were properly identified by PW1 and PW2. There was no case of mistaken identity. PW7 stated that ID parade was not conducted as the Appellants were found in recent possession of the stolen motor-vehicle registration No. KCA 712 T. PW2 went to Athi River police station after he learnt the motor vehicle was recovered and while recording his statement saw the Appellants, at the Police Station and identified them.

A. Whether the prosecution proved the doctrine of recent possession was proved /applicable in this case.

94. As regards the doctrine of recent possession, the court is fortified by the decision of *Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v. Republic Cr App. No. 272 of 2005(UR)* where the court held that:

:.....there must be positive proof:

i). that the property was found with the suspect;

ii). that the property is positively the property of the complainant;

iii). that the property was stolen from the complainant;

iv). that the property was recently stolen from the complainant.

95. In the case of *David Mugo Kimunge vs Republic CA 4 of 2014 [2015] e KLR* considered the doctrine of recent possession as follows;

> Where unexplained recent possession and that goods were stolen is established by the Prosecution for possessing stolen goods an inference of guilty knowledge upon which failing other evidence to the contrary, a conviction can rest.....two questions , that of recency of possession and that of contemporaneity of any explanation must be disposed of before the inference may properly be drawn.

According to PW1and PW3 the motor vehicle belonged to PW4 who produced documents of sale/ purchase and payment in Trial Court as exhibits in the Trial Court. PW5, PW6 and PW7 stated that at the time of the arrest, the Appellants were in possession of the motor vehicle. The hijack was conducted on 28th July 2017 when the motor vehicle was stolen from the special owners at the time PW1 & PW2 and the Appellants were arrested on 29th July 2017 in Illasit Town a day after. The motor vehicle was stolen while in possession of PW1who was in the company of PW2. The circumstances depict that the Appellants were in recent possession of the stolen motor vehicle Reg KCA 712T. The Appellants explanation of being in recent possession of the stolen motor vehicle was in their Defense is in form of a denial, mistaken identity and alibi. The Court finds that the Appellants were positively identified.

B. Whether the prosecution evidence was riddled with material contradictions

96. The Appellants claim that the Trial Magistrate relied on single evidence.

97. Section 143 of the *Evidence Act* states:

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

98. It therefore follows that even a single witness can prove the case against an accused person beyond reasonable doubt.

99. In the *Bukenya vs. Uganda (1972) EA 549* the court stated that the prosecution must make available all witnesses necessary to establish the truth. *In Keter vs. Republic 2007 EA 135* the court held:-

> " That the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses are sufficient to establish the charge beyond reasonable doubt."

100. The Trial Magistrate placed reliance on PW1 and PW2 evidence on the events leading upto the robbery with violence by the Appellants and others not before Court. Their evidence was corroborated by the evidence of PW 5 & PW 7 on recent possession of the stolen vehicle by the Appellants which this Court finds to be cogent and tangible evidence to prove the offences the appellants were charged with.

101. To the Appellants the prosecution witness evidence were riddled with contradictions and discrepancy. That the PW1 & PW2 evidence was not identical as to the number of persons who accosted them,

their description and who did what when during the alleged incident. The Court's has considered the Trial Court record, despite variance in exact number of people who approached them, their dress and who did what when, there was positive identification at the scene of the Appellants. If there were discrepancies, the Appellants had been placed at the scene of the crime and later found with the stolen motor vehicle. The discrepancies outlined by the Appellants do no go to the root of the case. The defence had the opportunity to cross–examine the witnesses to test the veracity of the evidence and the court considered the witnesses demeanour and credibility of the witnesses. There was no prejudice or lack of fair trial accorded to the Appellants.

102. In *Twehangane Alfred vs. Uganda, Crim. App. No 139 of 2001, [2003] UGCA, 6* it was held that it is not every contradiction that warrants rejection of evidence. As the court put it:

> "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."

103. In *Dickson Elia Nsamba Shapwata & Another vs. The Republic, Cr. App. No. 92 of 2007* the Court of Appeal of Tanzania in addressing the issue of discrepancies in evidence, held that:-

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

C. Whether the Prosecution disproved the defence of alibi pleaded by the Appellants

104. According to the Appellants, the Trial Magistrate failed to give due consideration of the Appellants defense. DW2 case was supported by his employer DW3 who stated that he was with DW2 at Illasit Town and could therefore have not been at the scene of the crime. The Court's view is that there is sufficient evidence on identification to place the Appellants at the scene of the crime. PW1 and PW2 positively identified the Appellants and it is more than mere coincidence that they were found hours/ day later in the stolen motor vehicle as passengers.

105. The Court of Appeal in *Charles Anjare Mwamusi V. R CRA No. 226 of 2002* stated that:

> "An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to the charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. Kimotho Kiarie V. Republic (1984) KLR 739 at page 745 paragraph 25."

106. In *Kimotho Kiarie vs Republic [1984] eKLR* mandates;

> that an alibi raises a specific defense and an accused person who puts forward an alibi as answer to the charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of the Court a doubt that is not unreasonable.

107. 1st Appellant stated that on 28th July 2017 he left Emali to go to Kimana to buy onions and watermelons. He rented a house at Cabanas. The following morning at 6am he took the go -cart

–'mkokoteni' to buy and carry goods. He met Police and he was arrested. He did not know the 2nd Accused. He did not assault the Complainant and he was not found with the stolen motor vehicle.

108. In cross examination he stated that he did not call/get the person who issued him with the receipt from the hotel at Cabanas where he slept and agreed that the stamp on the receipt could not be confirmed.

109. The 2nd Accused stated that he woke up at 4 am on 28th July 2017 and went to Loitoktok and worked in a hotel and they closed the shop and then boarded a vehicle with Kilonzo and Charles to Illasit where they spent the night. The following day his Boss sent him to the hotel to pick keys and he ran there on the way he heard gunshot everyone was running and the Police Officer stopped him and he was arrested.

110. DW2 Avandi Kilonzo testified that he runs a hotel Kwetu Dishes at Loitoktok. The 2nd Accused was his employee who begun working in May 2017 and he was arrested in July 2017.On 29th July 2017, they were leaving Illasit to Loitoktok and when they got to the stage, he realized he had no keys he sent 2nd Accused who ran across the road, a Police Officer fired in the air and people ran in different directions and 2nd Accused was arrested.

111. It was the duty of the prosecution to disprove the defense. The evidence of PW1& PW2 is that they were robbed motor vehicle Reg KCA 712T on 28th July2017. They were rescued and reported the incident to Police. PW5, PW6 & PW 7 received tip off of information that the motor vehicle was headed to Loitoktok & Illasit town and they pursued the motor vehicle and blocked it and inside were the Appellants, the 2nd Accused ran out and Police shot in the air and he was arrested and 1st Appellant was arrested. The evidence was sufficient to place the Appellants at the scene of crime and in possession of the stolen motor vehicle recently stolen from thee special owners PW1& PW2.

The Prosecution proved that motor vehicle Reg KCA 712T which was stolen in a robbery that occurred on 28th July 2017 and was recovered in Illasit following tipoff as evidenced by PW5, PW6, & PW7. Both Prosecution and Defense confirm a Police Officer's shot in the air. PW5 & PW7 confirmed that both Appellants were in the said motor vehicle, one of them 2nd Accused ran off and was arrested as he ran off and PW.5 did not lose sight of him. There was no patrol by Police on the day and police were not from the area. There was no crowd at the early hours of the morning, to allow mistaken identity.

112. In his evidence, PW4 stated that the accused persons were in front of them at Illasit where they were found inside the car. According to PW4, the 1st accused person was driving the car. He stated that he saw the accused with PW3 his driver. According to PW4, his driver had told him that there was an old man and young man who attacked them but that evidence was not in his statement and could not recall if it was there. He stated that there was a rope to tie the luggage. In his evidence, PW4 stated that he reported the case at 9.30 pm in Namanga and he lives in Namanga. He stated that the driver wrote his statement in Athi River. He stated that he could not recall when he wrote his statement but on 29th July 2017 they wrote a statement at Athi River police station (Gatiba).

113. The 2nd accused and DW1 other than alleging 2nd accused worked in a hotel-no single document was produced to ascertain this fact. The 1st Appellant & 2nd Appellants alibi does not cast doubt to the Prosecution case and the circumstances seem far-fetched and not plausible by any stretch of imagination, the evidence on record by prosecution is that Police Officers were in hot pursuit to confiscate a motor vehicle that was reported stolen, and found the vehicle with Appellants in it cannot be consistent with the version by defense that police officers from another area arrived to Illasit and randomly picked on the Appellants and left other people including DW2 at the scene on account of mistaken identity. At 3 - 4 am in the morning human traffic is scarce and low. The defense of alibi is unavailable to the Appellants.

114. In the upshot, the court finds that the conviction was based on sound evidence. The same is upheld.

D. Whether the sentence meted out was commensurate the offence charged

115. Under Section 296(2) of the Penal Code the offender shall be sentenced to death. According to the Appellants, 20 years life imprisonment is harsh and excessive. To the Appellants, they were first offenders and the stolen items and motor vehicle were recovered. The Appellants seek a non-custodial sentence.

116. Indeed, in *Bernard Kimani Gacheru vs. Republic [2002] eKLR*, the Court of Appeal restated that:

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

117. The Court notes that the Trial Magistrate, took into consideration the Supreme Court Judgment in *Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015*, (Muruatetu's case) in arriving at the sentence as well as the Appellants mitigation where the mandatory sentence was declared to be unconstitutional. The Trial Magistrate sentenced each accused person to 20 years imprisonment.

118. As a guide in sentence re-hearing the Supreme Court in Muruatetu Case (supra) held that inter alia the age of the offender and whether he/she is a first offender are factors to consider. The court is aware of the directions issued by the Supreme Court on 6th July,2021 in Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR hereinafter Muruatetu No.2 that the decision of Muruatetu and these guidelines apply only in respect to sentences of murder under Sections 203 and 204 of the Penal Code. However, there are Sentencing Guidelines that refer to aggravating and compelling and mitigating reasons to be considered in sentencing.

119. The 1st accused person stated that he was 73 years although no birth certificate was produced to confirm his age. The 2nd accused person stated that he was diabetic and had high blood pressure although no medical records were produced in support. It will be noted that PW1 and PW2 described the 1st accused as an old man and the 2nd accused as a young man. According to the 2nd accused person, he lamented that it had been difficult to access medication in prison. The court notes that no report from the prison was filed to counter or confirm the 2nd accused person allegations. During the robbery PW1 sustained injuries as result of the beating were confirmed by PW2 and PW8.

120. In Aden Abdi Simba vs. The DPP Petition No. 24 of 2015, where nobody was injured in the incident and the items were recovered, the court sentenced the accused to 15 years imprisonment. In Paul Ouma Otieno & Another vs. Republic [2018] eKLR the appellants were armed with guns, hence the court noted that it was a serious offence hence a sentence of 20 years' imprisonment would adequately serve the interest of justice.

121. According to PW7, PW1 and PW2 phones and money were not recovered but the motor vehicle was recovered. PW1 was injured. The court notes that the Appellants were in custody since 30th July, 2017 when they were arrested and charged in court on 1st August, 2017 before being sentenced on 21st December, 2020 which translates to 3 years and 5 months in custody.

122. Guided by the decisions and Guidelines of Sentencing, the period spent in custody and evidence in mitigation before the Trial Court, in the interest of justice to review the sentence. The sentence of 20 years imprisonment on each Appellants is reduced to 15 years imprisonment.

Disposition

123. In the premises, the conviction by Trial Court is upheld. I hereby set aside the sentence imposed on each Appellants of 20 years imprisonment, and substitute therefore to fifteen (15) years imprisonment to run from the date when they were charged in court on 1st August,2017 pursuant to section 333(2) of the Criminal Procedure Code.

Judgment accordingly.

DELIVERED, DATED AND SIGNED IN COURT (VIRTUALLY) AT MACHAKOS THIS 18TH DAY OF NOVEMBER 2021.

M.W MUIGAI

JUDGE