



**Engau v Republic (Criminal Appeal 36 of 2020)
[2021] KEHC 324 (KLR) (6 December 2021) (Judgment)**

Neutral citation: [2021] KEHC 324 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL 36 OF 2020
MW MUIGAI, J
DECEMBER 6, 2021**

BETWEEN

JOSEPH MUSYOKA ENGAU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence arising from the decision by Hon. Gilbert Shikwe (SRM) in Kithimani PM's Court in Criminal Case No. 904 of 2015 delivered on 20th March 2018)

JUDGMENT

Background

1. This Appeal arises out of a judgment and sentence delivered at Kithimani Law Courts by Hon G. O. Shikwe (SRM) on 20th March 2018.
2. The Appellant and another were charged with three counts of the offence of Robbery with violence contrary to section 295 as read with section 296 (2) of the [Penal Code](#), Cap 63 of the Laws of Kenya.
3. In Count I, the particulars of the offence are that the accused persons, on 19th day of July 2015 at around 0300 hours at Matuu township in Yatta Sub County within Machakos county jointly with others not before the court robbed Mrs. Joyce Wambua of a television set make Bruhm valued at Kshs. 15,000, a mobile phone make Samsung valued at Kshs. 6,000 and a pair of shoes valued at Kshs. 2,300 all valued at Kshs. 23,300 and immediately before the time of such robbery threatened to assault her.
4. In Count II, the particulars are that on 19th day of July 2015 at around 0300 hours at Matuu township in Yatta Sub County within Machakos county jointly with others not before the court robbed Mr. Urbanus Kioko of a DVD player make AUCMA valued at Kshs 3,500, a mobile phone make Tecno



valued at Kshs. 7,000 and cash Kshs. 4500 all valued at Kshs. 15,000 and immediately before the time of such robbery assaulted the said Urbanus Kioko.

5. In Count III, the particulars are that on 19th day of July 2015 at around 0300 hours at Matuu township in Yatta Sub County within Machakos county jointly with others not before the court robbed Ms. Pauline Mumbua Mulei of a mobile phone make Samsung valued at Kshs. 9,000 and immediately before the time of such robbery assaulted the said Pauline Mumbua Mulei.
6. There is an alternative charge against the Appellant where he is charged with the offence of handling stolen property. The particulars are that on 19th day of July 2015 at around 0535 hours at Kithimani police barrier in Yatta Sub County within Machakos County, otherwise in the course of stealing knowing or having reason to believe them to be stolen goods dishonestly retained the following items, A television set make BRUHM, a DVD player make AUCMA, two remote controls and a brown jacket.
7. The Appellant pleaded not guilty and the case proceeded to full hearing before this court whereby prosecution called twelve (12) witness of its case while the accused persons chose to give unsworn testimonies and did not call any witness.

Trial Court Proceedings

8. The case as presented by the prosecution on 19th of July 2015 at around 3.00 pm, Joyce Katinda Wambua, PW1, while asleep in her house heard the sound of someone cutting metal grills outside, woke her husband up and went to the main door to find out what was going on. They were joined by her brother in law. She stated that she heard something like a gunshot. She then locked herself in the bathroom of her bedroom and was later joined by her husband who is a police officer. She asked her husband to get his gun but he told her he did not have it with him that day.
9. She deposed that she heard some commotion in the sitting room but after sometime it stopped and on coming out of the bedroom found the TV set, Samsung phone, two remote control DVD belonging to her brother in law were stolen. Her son's safari boots, jacket, handbag and phone were also stolen. She said that the robbers gained entry through the window grills which they cut and produced a catapult that was marked as MFI-1. The brother in law was injured and that the watchman at a nearby premises called the police. At 9am the next day, the police called her and told her a TV braum, jacket, 2 remote control DVD had been recovered. She did not identify anyone the night of the robbery. The television set was MFI-2, receipt for the television set MFI-3, DVD Aucma MF1-4, Sony DVD remote MF-5 and television set remote MFI-6.
10. The Appellant did not cross examine PW1 however when cross examined by PW2, she stated that she did not report the incident to the police but was called the next day about some recovered things. She stated that there were witnesses including the watchman at the church. She also said she saw an injury on her brother in law's head that was plastered.
11. In re-examination, she told the court that her husband was called from the police station and they all went and recorded statements.
12. David Wambua Force Number 215495 was PW2, he told the court that on 19th July 2015 at 3.00am he was woken up by his brother Albanus Kioko saying he had heard some people outside. He opened the door to see who was outside and saw three people who got inside his house with crude weapons. The 1st accused person who wore a jacket had a torch and sling which he had put on his shoulder and it looked like a gun. He ran back to the house and they locked themselves in.



13. It was his testimony that there were security lights and he saw the 2nd accused person very well breaking the locked door, he had an iron bar. The third person was not in court. They heard an explosion which they thought was a gun and he and his brother ran into their respective rooms and he locked the steel door. He then called the police who came. He then went to see his brother when they had left and found him injured on the forehead and shoulder and he told him Kshs. 4,500 had been stolen from him. He said they also stole a television set, remote control and mobile phones that had been left to charge.
14. It was his testimony that he found a stick that had been wrapped with a rubber band and when the police came, they took the stick and started searching for the robbers. He said the police called him at 6.00am informing him that two people had been arrested at a roadblock between Thika and NYS with a television set and other things and he went to the police station where he identified the items. He identified MF1-7. He took his brother to hospital for treatment. They recorded their statements in the morning and in the afternoon an identification parade was conducted and he identified the Appellant as he was brown and the tallest of the people who came to the house. He identified the 2nd accused person whom he said was the shortest of the three. He told the court that he did not lose anything and neither was he injured. He identified MFI-8 and MFI-9 which was the identification parade report.
15. In cross examination, he stated that when he went outside with his brother to find out who was outside, he saw the Appellant and retreated back facing him. He told the police that he could identify the robbers and how they were dressed. He identified his property in the office of the CID where they were. It was his testimony that the people paraded looked almost similar in height, stature and looks, that the Appellant had no injuries. He said he wrote two statements, one at the time of reporting and the other after the identification parade.
16. When cross examined by the 2nd accused person, he stated that he called the police and informed them that robbers had attacked and had gotten in through the door. That he narrated what had happened and tried to explain what the robbers looked like, what they had worn and the stolen items. For example, he said that the 2nd accused person had beards which were longer and bushier than others. He said he did not slap him, they had crude weapons and he observed him for 2-3 minutes as he entered and thereafter ran and locked himself inside his bedroom. That the appellant shone his torch on him and the security lights were also on.
17. Upon re-examination, he said that when he opened the door, they entered through the door but had earlier attempted to gain entry through the kitchen window.
18. Albanus Kioko Mbaluka, PW3, stated that on 19th July 2015 at 3.00pm while sleeping in the house with his wife when he heard the door knocked. in the house were his brother and two (2) sisters in law. The sister in law who was sleeping in the sitting room told him there were people outside. He then switched on the lights in his bedroom, sitting room and kitchen then went to wake his brother up and they went to see who was outside when they heard a voice say, “kuja hapa mzee.”
19. PW2 told him that they should retreat and he saw two people get in and one of them had a torch, the third person was still outside. They ran and closed the second door from the sitting room and held onto it and that is when they heard an explosion and they ran as they didn’t know how many bullets they had.
20. Two of the robbers got into his room; one who was tall and dark and had a panga and another who was young and had beards had a crowbar, the one with a panga asked for his phone which he gave while the second accused person asked for money and he gave him Kshs. 4500. One of the robbers was not in court. The 2nd accused person asked for more money and commanded him to lie down then hit his



right shoulder. A third person who was brown and had wrinkles held something like a gun stood at the door. The lights were on and the robbers had not covered their faces.

21. It was his testimony that they stayed for 20-30 minutes and later he learnt they had made away with his Auema DVD player, his brownish (grey-purple) jacket. They went to his brother's room but found it locked. He recorded his statement in the morning, an identification parade was conducted at Matuu Police Station in the Afternoon and he went to hospital for treatment. He identified MFI-10, the P3 form and MFI-1 to MFI-7 at the police station.
22. In cross examination he said his brother opened the door and he saw two people enter, that the police came and interrogated them and he thinks it is his brother who called them. They went to identify the recovered items at the police station. He testified that he identified the Appellant because he was brown and had a lot of wrinkles as he had seen him standing by his bedroom door.
23. Upon cross examination by the 2nd Accused person, he said he did not describe the robbers to the police who first came to his house. He identified him because he had a beard and he had no injury. That he saw him well and he had a crowbar. He also said his recorded statement did not include the description of the robbers.
24. When re-examined he said he told the police who he saw while at the police station.
25. PW4 was Pauline Mumbua, who told the court that while sleeping in the sitting room, she heard a knock at 3.00am at the door and others cutting the kitchen window. She then ran to the inner rooms. She was in the house with her sister and the husband Albanus and his brother in law and the wife. She found PW3 at the door and she told him what was happening. PW3 switched on the lights and went to wake up PW2. Her sister started screaming. She then heard people in the corridor as if struggling to push the door then shortly an explosion. It was her testimony that PW3 ran into his room followed by three men, one had a panga, the other an iron bar and the other had slung something on his shoulder like a gun. The one with a panga demanded for Pw3's phone while the 2nd accused person who was young and had a stylish beard demanded for money and demanded for more money upon being given some money. He then went behind PW3 and hit his shoulder with an iron bar. She was seated on the bed while holding her phone which she gave the 2nd accused person and told them it was her sister's. The other man who was brown and his face had wrinkles stood by the door and kept checking inside the room and the other side. She told the court that they were told to sleep and when they had left, they went to the sitting room and discovered the Television set, remote control, Albanus jacket and safari boots were stolen. She then saw the police after a while who went round the house and found a catapult. She identified the items at the police station and in the afternoon at the identification parade, identified accused 1 because his face was wrinkled and he appeared older than the others and accused 2 who had an iron bar at the time.
26. In cross- examination by the Appellant, she said when she heard people at the door, she ran to PW3's room whom she found awake and she remained in that room. PW3 went to call PW2 and after sometime came back to the room with three men. She had told the police the description of the people and at the identification parade identified the Appellant well. She also identified the recovered items. She also said she went to the police station the next day, that one of the three persons she saw was not before the court. That she did not see the police write anything at the time she was giving the description to the police. Upon further cross examination he stated that she went to the police station with people but alone during the identification parade.
27. PW.5 was Benjamin Maingi a Clinical Officer based at Matuu District Hospital. He attended to Mr. Albanus Kioko Mbaluka (PW.3) whom he saw had sustained injuries on the right shoulder and a cut



- of the face. He stated that Albanus told him that the assailant had used an iron bar during the incident. He produced the P.3 form for Albanus as P. exhibit 10.
28. Corporal David Muturi, Force Number 77199 who works at CID Headquarters was PW6. He examined exhibit A brought to him by PC Metto from Yatta which was a small stick and contained remnant of ash and found out that it was an improvised gadget when stick using a nail makes the sound of a gunshot, a low explosive when friction is applied and cannot cause fatal injuries unless applied where there are flammables. He submitted his report of 12th November 2015 and produced it in court as exhibit 11 and 12. There was no cross examination.
 29. PW7 was Constable Stanley Korir from CID Yatta who was on patrol on 19th of July 2015 at 3.00am with Police Constable Metto and Police Constable Mohammed at Matuu Township when they received a call from DCIO Sergeant Mwachia that they had received a complaint about a house invasion. They went to the location and found the complainant in the company of others who explained what had happened and the items that were stolen as a Television, 1 DVD, remote controls for DVD and Tv and three mobile phones. One of them was wounded.
 30. He stated that when they went round the house they noted that the window leading to the kitchen was broken. They went to the police station with the complainant who recorded a statement. He told the court that the telephone numbers were given to the intelligence officers who tracked the phones to Sofia market. They then informed the police at the roadblocks and at 5.00am the police at Kithimani roadblock said they had apprehended two suspects aboard Silker shuttle in possession of things matching the description given. They proceeded to the road block where they found with 1 Television set, 1 DVD, 2 remote controls and 2 mobile phones ITEI and Samsung, jacket and bag. The bag was marked as MFI-13 and a yellow paper bag MFI-14. He searched the accused persons again and found the Appellant with two receipts dated 18th July 2015 and 19th July 2015 for Nairobi to Matuu and the other for Matuu to Nairobi. The same were marked at MFI-15 and MFI-16 respectively.
 31. Upon cross examination, he stated that they went to the scene and they questioned the complainant and no report was taken at the scene. He said that after the complaints wrote statements a report was minuted on the OB. That the thugs got in through the door. He found the two accused persons outside detained by police after they stopped the motor vehicle, Silker in possession of the stolen items. The tickets had no names but were found in the accused person's possession. Further, that he found the accused persons seated on the ground after police searched the motor vehicle. He told the court that he did not find the 2nd accused person with money but a ticket showing he was travelling from Matuu to Nairobi.
 32. Upon re- examination he said that he recovered the tickets in their shirt pockets but did not recover any money.
 33. PW1 was recalled upon the request of the Appellant, she testified to the effect that she did not see any of the robbers hence could not identify them at the station. She just wrote her statement and went home.
 34. PW8, a conductor of Silker Agencies, Daniel Mutuku in KCC 363M Matatu told the court that at 3 a.m on a date he could not recall while enroute from Ekalakala, two gentlemen at Sofia boarded the matatu with a yellow paper bag and shortly after stopped at the NYS roadblock by the police where he was interrogated and confirmed that he had carried two people from Matuu. He pointed to them the two men who were removed from the vehicle. Tv flat screen remote, torch, DVD and black shoes were found. He identified MFI-16 and MFI-17 as the tickets that were used.
 35. In cross examination, he said that a passenger is issued with a ticket when he enters the vehicle which has a date indicated on it. Fare is Kshs. 200. It was his evidence that the first passenger with a paper



- bag came out then identified his accomplice. He said that the only luggage the conductor knows is the one on the carrier however the passenger usually sits with his luggage. That the ticket would tell them where one had boarded the motor vehicle owing to the fare.
36. PW9, Police Constable Geoffrey Njuguna, Number 77116 was at Yatta roadblock at night with PC Kibor and APC Kariuki on 19th of July 2015 when he received a report from Corporal Sientei about a robbery in Matuu. At 5.35am while inspecting the cars passing through, he stopped KCC363F Silker Agencies and saw the Appellant seated on the second row left side with a Television set on his lap while covered with a jacket and a yellow paper bag. Upon inquiry as to where he got the Television set, the Appellant said it was his and he was taking it for repair and pointed the 2nd accused person who was seated directly in front of him as his witness. The other passengers said that the 2nd accused person boarded the matatu with the items and gave them to the Appellant, they interrogated them but the two accused persons could not explain where they were from. He then identified MFI-17 and MFI-18. He testified that the Identity cards given to him by the Appellant from his pocket, MF1-19 and thereafter MF1-20 did not match the Appellant's face and name. He identified MFI-6, MFI-6, MFI-21 and MFI-22 as the two remote controls, and phones make red ITEL and a Samsung respectively. The accused were then arrested and taken to Matuu and the exhibits collected.
 37. When cross examined by the accused persons, he said that the 2nd accused person was seated on the 3rd row seat from the rear, had a bus ticket and was pointed out by the other passengers as an accomplice. He said that he found MFI-20, Samsung phone with him and that he refused to disembark and that is when some passengers used force and he sustained injuries. There was no re-examination.
 38. Corporal Samuel Sitienei, number 66709 of Yatta Police station was PW10 who was in charge of the Yatta police road block confirmed that he received information from police radio at 4am of a break in and robbery in a house and told PW9 that they should inspect the motor vehicles. He reiterated what PW9 about what transpired at the road block on 19th of July 2015. He added that he called CID Matuu who arrested the accused persons and to all the exhibits.
 39. In cross examination he said that the 2nd accused person was identified by the conductor and passengers and the Samsung phone was found with him. Also, that the 2nd accused person was not injured at the time.
 40. It was his testimony that the other passengers shouted "Mwingine ndio huyu," when re-examined. That the accused person had a small paperbag that had wrapped the phone.
 41. PW2 was recalled in 2nd of October 2017 at the request of the Appellant and he told the court upon cross examination that he was able to give a description of how the assailants were dressed and that may not be reflected in the first report but he knows whom he identified. He said it was the Appellant who attacked him, that the co-accused person was the one who was injured and that at the identification parade everyone had a bandage. He reiterated that they were called in the morning to identify the items recovered. When re-examined, he said they were not allowed to see the suspects before the identification parade.
 42. PW11, Police Constable Edwin Metto was the investigating officer. He said that on 19th of July 2015 at 3.00am upon receiving a call while on duty with PW7 and PC Hussein, a driver about a robbery in Matuu, he proceeded to PW2's home and they were given a report of what had transpired and upon recording the OB, they circulated the information to other offices on night duty including those on patrol. At 5.30am they received information about arrest of two suspects with goods suspected to have been stolen and PW7 went to the roadblock. The items recovered were Tv Set Serial Number E24E8700140400400001, two remote switches, DVD player AUCMA serial number 5070529075v



- black porch and a grey jacket, P exhibit 15 16 and 17. He said that the identification parade was presided over by Inspector Mwachia and referred to P. exhibit 8 and 9 where the accused persons were positively identified. He then issued PW3 with a P3 form, P. exhibit 10, submitted the piece of stick with a metallic strip, P. exhibit 12 to the bomb disposal who said it was an improvised explosive.
43. He said he interrogated the accused persons and the Appellant said that they had left Nairobi the previous day as the 2nd accused person had a job for him in Matuu. The Appellant recorded his statement, P. exhibit 23 before CIP Fredrick Kaya Inspector Nehemiah Ogero, P. exhibit 24 where he denied ever knowing the accused.
 44. Upon investigation, it was discovered that the two accused persons knew each other and were in communication the previous day. This was done by call data from Airtel on itel imei 866499014989344 phone number 0731687135 and phone number 070687135, Itel was produced as P. Exhibit 21, airtel data MFI-25, Samsung Imei 35998704561540 P. Exhibit 22. He said the victims identified the items recovered as follows; P. Exhibit 7, the television set was identified by PW1, P. Exhibit 4, 6 and 7 by PW3. P. Exhibit 13 and 14, the black perch and the yellow bag were not identified and some items were never recovered. He also said the assailants were identified when the lights were on.
 45. In cross examination he stated that he recorded the description of the assailants in his notebook, one was short, the other old. He denied the allegation of torturing the Appellant in his office. He did not do the identification parade neither did he take down the Appellant's statement. He said that the Appellant was caught in a bus running away to Nairobi. That data was captured the previous day at 8.36am where the accused persons communicated with each other.
 46. PW3 was recalled by the Appellant and in addition to his testimony of 21st September 2016 stated that his statement was formally taken at the police station where he also said he knew and could identify the attackers. He reiterated that the lights were on as he is the one who switched them on and he saw the attackers very well and he saw the Appellant who was at his bedroom.
 47. Upon Re- examination, he said he was in PW2's house and he saw in them once they got into the house.
 48. The last prosecution witness was PW12 , CIP Frederick Konya, force number 231817 who was in charge of personnel Yatta division on 19th of July 2015 who took the Appellant's statement told him that he was a mkokoteni driver who was asked by the Wa Gitonga to accompany him to Sofia to collect some luggage. They travelled on 12th of July 2015, luggage brought on 19th of July 2015 at 3pm when 4 people dropped the luggage for which wa Gitonga gave them money and they boarded back to Nairobi, that the motor vehicle had no passengers. That there was TV and DVD on the seat and when they stopped at the roadblock, they were arrested. He was not told wa Gitonga's full names. He said the Appellant denied being involved in the robbery however he confirmed they received the TV and DVD. He said the statement was given freely and signed on each page.
 49. Upon Cross-examination, he said that the Appellant was not in handcuffs and no one else was in the room neither did he ask to have a witness present. He also said he was assisting in the investigations.
 50. Upon re-examination, he said that the Appellant alleged that he had been assaulted but did not show any marks of such assault and denied beating him up.
 51. That Prosecution closed their case.
 52. The court delivered a Ruling on a case to answer on 23rd January 2021 and found that the accused persons had a case to answer.



53. At this juncture, the Appellant made an application to recall PW9 for cross –examination which was allowed and to which he relied on his earlier statement and in addition stated that the vehicle was not taken to the police station because it was not an exhibit, that the accused did not deny the luggage being his. He handed the recovered items to the investigating officer and was not aware about finger prints. That the conductor told him that the accused persons boarded between Matuu and Sofia. When re-examined he stated that the Appellant had a paper bag and had said he was taking the items to the fundi when he was asked where he was taking them.
54. The Appellant who transports groceries, in his unsworn testimony stated that on 18th of July 2015 he left for Katililiye near Masinga dam to collect some luggage. He then boarded a matatu back to Nairobi and at NYS area, the vehicle was stopped whereupon he was woken up and asked to down his seat. He denied knowledge and said his luggage was at the corner but the police did not listen and instead beat him up, cuffed him, beat him with riffles injuring him. He denied knowing why he was in court. He then asked for leniency, to be set free because he was an old man whose children depended on and his wife was convulsing after an accident.
55. The 2nd accused person who he used to sell clothes in Gikomba said that in 15th July 2015 went home when he received a called from his employer asking him to return on 19th of July 2015 as he wanted him to collect some items from the store. He said he left Kabati on the night of 18th at 4am for Matuu where he boarded a bus to Nairobi and was charged Kshs. 200/-. The vehicle was stopped at NYS roadblock, he was woken up and no reason was given to him for his apprehension, he was handcuffed and taken to the police station. He also said he did not know why he was arrested and asked for his freedom.

Trial Court Judgment

56. The Trial Court in finding the accused persons guilty relied on the case of *Wamunga vs Republic (1989) KLR 424* at page 26 on the duty of the trial court to examine evidence or identification or recognition carefully and to be satisfied that the circumstances of identification were favourable and free from error before it can safely make it the basis of a conviction.
57. The Trial Court having analysed the evidence concluded that the two accused persons were in a group of the persons who robbed the victims herein. Further, that even if there was doubt, the incident of the accused persons were found in a Nairobi bound bus 2 hours after the incident ‘with some of the stolen items settles any doubt of their involvement in the robbery.
58. The investigating Officer demonstrated that the two accused persons were in contact the previous day and therefore knew each other contrary to their denial of each other in their defence. The court found that the accused defence consisted of mere denials and nothing had been offered to counter any of the allegations levelled upon them.
59. The Trial Court found that the identification parade by the three is additional evidence to the testimonies given by the victims who had seen the accused persons. It concluded that the victims were robbed by three persons two of whom were arrested and charged.
60. The Appellants were found guilty and sentenced to imprisonment for twenty (20) years.

The Appeal

61. The Appellant filed a petition of Appeal on 10th of March 2020 on the grounds THAT;
 - a. The Learned Trial Magistrate erred in law and fact by convicting on a defective charge sheet.



- b. The Learned Trial Magistrate erred in law by failing to observe that the evidence relied upon by the prosecution fell too short of the certainty required in law in cases of this nature.
 - c. The Learned Trial Magistrate erred in law by failing to observe that the provision of Section 169(1) of the Criminal Procedure Code was contravened.
 - d. The Learned Trial Magistrate erred in admitting and alleged confession which was inadmissible in law for non-compliance with the law on how the statement is to be procured.
62. The Appellant prays that the appeal succeed in its entirety, conviction quashed and sentence set aside.
63. The appeal came up for mention for directions on 10th of December 2020 and directions were taken that the matter would be disposed of by written submissions.

Appellant's Submissions

64. The Appellant filed his submissions on 5th of October 2021 in which he advanced five main arguments. He opined that there was lack of positive identification as this was an incident that occurred at night in which as alleged, the only source of lighting was from security lights at the corridor of the building. That there was need for interrogation of the distance of the said lighting and its intensity so as to have positive identification. He faulted the Learned Trial Magistrate for failing to interrogate this.
65. Further, that there was no first report prepared by the police nor was anything in relation to the incident recorded in any investigation diary on the description of the assailants so that the witnesses could identify them on the said description. In doing so he relied on the case of *Maitanyi vs Republic [1986] eKLR* on the evidence of a single testifying witness and the case of *Simiyu & Another vs Republic [2005] 1KLR 192* on the importance of giving a description of attackers to the police. He also deposed that no identification parade was conducted and that PW11 alludes to a parade that was conducted by Inspector Mwachia who did not give any evidence.
66. The second argument was on the doctrine of recent possession where he submitted that though PW9 and PW10 purported to have acted on the purported recovery to have acted on the information received and stopped the motor vehicle in which the accused persons were in, the search and recovery was not done as per the police standing orders. He placed reliance on the guidelines of recent possession provided for in the case of *Isaac Ng'ang'a Kabiga vs Republic [2006] eKLR* and the case of *Joseph Kisilu Mulinge Vs Republic [2014] eKLR*. Further that the procedure of receiving the arrested persons ought to be done with an inventory of the stolen items together with a search and recovery form duly filled. To this end he relied on the case of *Joseph Murimi Gitusbo and Another Vs. Republic [2020] eKLR*. He therefore asked the court to find that there was no positive identification, no tangible proof that the identification parade was conducted nor proof that search and recovery was conducted.
67. The third ground upon which the Appellant submitted was on Section 65 and 77 of the *Evidence Act* not being... as PW11 was not competent to produce expert report and he cited the case of *Emmanuel Mwadime vs R [2016] eKLR* as well as *Julius Karisa Chengo -vs- Republic [2019] eKLR* and thus the evidence produced was hearsay. To this end he cited the case of *Feisal Mohamed Ali vs Republic [2018] eKLR* where the court emphasised on the importance of the content of the transcript from the mobile provider
68. The Appellant opined that CIP Mwachia, IP Ogero and Officer from Airtel who according to him were critical witnesses were not called. He relied on the case of *Bukenya & others vs Uganda [1972]*



EA 549 which discussed the importance of the prosecution to avail all witnesses necessary to establish the truth.

69. The other ground was on the explicit contradictions in the case. He deposed that PW2 said there was early positive identification to the police while the rest say it was not done. That PW2 and PW11 said there was identification parade carried while PW1 refutes those claims at page 4 of the proceedings. He asked the court to consider the determination in *David Ojeambuo vs Federal Republic of Nigeria [2014]*, *John Mutua Musyoki vs R [2017]* eKLR
70. The Appellant felt that his defence was not considered by the Trial Court and relied on the case of *Boniface Okeyo vs Republic [2001]* eKLR.

Respondent Submissions

71. The Respondent filed its submissions dated 25th of February 2021 on 4th of March 2021 in which he raised two issues. As to whether the conviction was proper, he submitted in the affirmative. He opined that the ingredients for robbery with violence provided under Section 296(2) of the Penal Code, Cap 63 Laws of Kenya (hereinafter referred to as the ‘Penal Code’), that states;

“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”.

72. He set out the ingredients of the crime as follows;

1. The accused is armed with any dangerous or offensive weapon
2. The accused is in the company of more than one or more person
3. The accused threatens to use violence before, during and after the said robbery incident
4. He also relied on the case of *Yohana Ndungu vs Republic*

(Criminal Appeal 116 of 1995)UR where the court reiterated the acts that constitute robbery with violence under section 296 (2).

73. He submitted that the ingredients of Robbery with violence were met as PW1, PW2, PW3 and PW4 placed the accused person at the scene of the crime, he was properly identified at the identification parade that was done hours after the robbery and he was evidently part of the gang that attacked and stole the complainant’s household items. He referred the court to P. Exhibit 8 & 9. That further, the Appellant was arrested with the complainant’s stolen items in his house and thus the doctrine of recent possession applies to him.
74. Secondly, with regards to whether the sentence was proper, he submitted that 20 years was appropriate.

Appellant’s Further Submissions

75. The Appellant filed a reply to Respondent’s submissions on 17th of May 2021 in which he also submitted on two issues. As to whether the sentence was proper, he submitted on three limbs, firstly, that the witnesses could only place him at the scene of the crime if they described his appearance



and physical features to the police in their first report which they did not and quoted the following witnesses;

- a. PW1 at page 19, line 18-19 said “I did not go to report but police called me next day to identify the recorded things.”
- b. PW2 at page 54, line 1-5 said, “I was able to give a description on how the assailants were dressed.....it may not be reflected in the first report but I know what I testified and who I identified. The issue of giving description in the investigation diary does not arise.”
- c. PW3 at page 26 line 15-17 stated “I did not describe their faces then to the police who came to the house. I can’t recall them writing or taking notes.” and at page 27 lines 9-10 said “I recorded my statement but I did not include description of the robbers.”
- d. PW4 at page 29, line 13-15 said “I told police description of those men. One is not before court I did not see the police note anything at the time.”

76. Reliance was also placed on the case of Mohamed Elibite Hibuya & Another vs R Criminal Appeal No. 22 of 1996 (Unreported) where the court observed that both the investigating officer and the prosecutor have to ensure that information is recorded during investigation and elicited during trial and that omission of such evidence is fatal as this has proven to be a reliable way of testing the power of observation and accuracy of memory of a witness and the degree of consistency in evidence.
77. Secondly, he submitted that no identification parade was conducted to positively identify him and that PW1 confirmed the same at page 40, line 6-7 which issue the Trial Court questioned why CIP Mwachia was not availed to produce the said report and exhibit. He submitted that this was an exercise in futility as the first report inclusive of descriptions was not done by the witnesses at the earliest opportunity.
78. Thirdly, the Appellant submitted that the doctrine of recent possession does not apply as there was no cogent evidence of search and recovery of the alleged stolen goods and the procedure not followed in that PW8 and PW9 did not record the action of doing search and recovery on the accused persons nor the items that were allegedly found in their possession. He opined that they abdicated their duty and left it to the investigating officer making reference to page 68 line 12-17 where PW9 said, “the recovery form was filled by the investigating officer. I did not write it....I just arrested you recovered the items and handed over to the investigating officer.”
79. To support this he relied on the case of Joseph Murimi Gitusho & Another vs Republic [2020] eKLR where the court referred to Section 57 of the National Police Service Act that requires a police officer during seizure to record the action, record items taken and make a report of it available to his superior.
80. As regards the sentence, the Appellant submits that there are many glaring gaps and unexplained circumstances weakened the case against him and hence twenty (20) years sentence is harsh, unfair and disproportionate and should not be upheld.

Determination

81. The Court considered the Petition, Response, Trial Court record/judgment and evidence adduced before the Trial Court and submissions filed on behalf of respective parties in this appeal.

Jurisdiction



82. This Court is the first appellate court, has legal duty to carefully examine and analyze and evaluate afresh the evidence on record and come to its own conclusion on the evidence but always observing that the Trial Court had the advantage of seeing and hearing the witnesses and observing their demeanor and so the first appellate court must give allowance of the same. This was observed in the case of *Okeno V. Republic* [1972] EA 32 where the court stated as follows:

“The first Appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala -V- R. (1975) EA 57). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

Evaluation

83. The Court shall consider what constitutes the offence of robbery with violence. In the case of *Oluoch vs Republic* (1985) KLR where the Court of Appeal stated as follows:-

“...Robbery with violence is committed in any of the following circumstances:

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

The offender is in company with one or more person or persons; or

At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person.”

84. 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.”

85. As properly observed by the Trial Court the ingredients of the offence of robbery with violence were set out in the case-law authority of *Oluoch v. R*, supra.

86. In this case, not one but three of the elements of the offence of robbery with violence were satisfied. PW2 testified that on the night of 19th July 2015, 3 people entered their house with crude weapons. 1st Accused had a torch and sling on his shoulder that looked like a gun. He ran inwards and the 2nd Accused broke the door and entered and he had an iron bar. There was a 3rd person who was not in Court. He heard an explosion that he thought it was a gun. He called his colleagues, Police on phone. PW3 saw 2 people that night who followed him to his room. One of the persons had a panga and was not in Court. The 2nd person had a crowbar. The one with a panga asked him for his phone and he gave him. The 2nd Accused asked for money and he gave him KShs 4,500/- from his coat. He asked him for more money and hit him with crowbar on his right shoulder and commanded him to lie down. A 3rd person came in and stood at the door and held onto something that looked like a gun. The Appellant, 1st Accused, with a crude weapon and a make shift stick that could also act as an explosive was found at the scene of the crime. Secondly, the Appellant was in the company of more than one person, he was in the company of the 2nd accused person and another person not before the court. This was stated by



PW2 and corroborated by PW3 and PW4. Thirdly, there was threat of and actual violence, before and during the commission of the crime; the 2nd Accused hit PW3 with crowbar on right shoulder. PW5 the Clinical Officer who treated PW3 testified as to the injury on the right shoulder and cut on the face.

Identification

87. 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?”

88. On whether, the Accused persons were identified on the said night, PW2 stated that there were security lights outside the house and also illuminated the corridor inside the house. He saw 2nd Accused well after he broke the door and he had a crowbar. PW3 stated that he saw 2nd Accused and he talked to him and asked him for money. The lights were on and the robbers had not covered their faces. He identified the 3rd man who was brown and had wrinkles. They were there for 20-30 minutes. PW4 confirmed that she saw 3 men, one had a panga, another man had an iron bar and the 3rd man had slung something on his shoulder like a gun. The 2nd Accused asked PW3 for money he gave him and he hit him with the iron bar. The 2nd accused appeared young and had a stylish beard cut. He asked her for her phone and she gave it to him. The 3rd man came and stood at the door, he was brown and his face had wrinkles. They were told to sleep and they left when it was all silent. When they came to the sitting room, they found TV remote control, jacket safari boots were missing/stolen.

89. On the issue of identification, I am satisfied that the Accused persons were positively identified by the victims. PW2, PW3 & PW4 gave a description of the Appellant as being brown and tall while the 2nd accused person having a beard. The Trial Court therefore did not rely on the evidence of one witness. The evidence of identification was corroborated by PW2 PW3 & PW4. The identification of the Appellant was not by a single witness as submitted by the Appellant but 3 witnesses. The circumstances as outlined above were conducive for proper identification, the lighting was sufficient, the witnesses and Accused persons were in close proximity to facilitate identification and they Accused persons spoke to the Witnesses/Victim. There was human contact when PW.3 was hit by the 2nd accused on the right shoulder. I therefore find that the commission of the offence has been proved by the evidence on record.

Contradictions/inconsistencies

90. The Appellant raises an issue with the contradictions and inconsistencies of witnesses. I note that apart from indicating that there were inconsistencies and contradictions the Appellant failed to spell out the specific instances so as to enable this Court consider if indeed there were inconsistencies or contradictions and if so were they minor or did they go to the root of the matter and were prejudicial to the Accused persons rights in a fair hearing or not. In the case of *Philip Nzaka Watu v. Republic [2016] e KLR*, the Court of Appeal held:-

“However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the



same phenomenon exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question”.

The only contradiction is raised with regard to the witnesses’ first report of the accused person to the police and the conduct of Identification Parade. This shall be considered here below.

Identification Parade

91. The issue is of identification parades and whether or not they were conducted. All in all, the evidence tabled before the court shows that the identification of the Appellant by PW2 is corroborated by PW3 and PW4. The Identification parade was conducted by Inspector Mwachia who did not testify in Court but the Identification Reports were produced as Exhibits 8 & 9 by PW.11 P.C. Edwin Metto the Investigating Officer. The reasons for non -attendance were not recorded so as the Trial Court could consider the appropriate way forward.

92. The Court of Appeal in [*Samuel Kilonzo Musau vs Republic \[2014\]*](#) on identification parade indicated 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.” It is precisely for that reason that courts have insisted that identification parades must be fair and be seen to be fair. Scrupulous compliance with the rules in the conduct of identification parades is necessary to eliminate any unfairness or risk of erroneous identification. In particular, all precautions have to be taken to ensure that a witness’s attention is not directed specifically to the suspect

instead of equally to all persons in the parade. Once a witness has properly identified a suspect out of court, the witness is allowed to identify him on the dock on the basis that such dock identification is safe and reliable, it being confirmed by the earlier out of court identification.”

93. Although the Accused persons from the records, Exhibit 8 & 9 shows that the Appellant was positively identified, it is not safe for the Court to rely on identification parade evidence, where the Identification parade Officer was not called to testify on the conduct of the ID parade. This is cardinal to the tenets of a fair hearing under Article 50 of COK 2010. In the absence of reasons why either the Officer was not called or whether his whereabouts could/could not be confirmed or whether reasonable explanation was made to the Trial Court so that the Court may have considered production of the Identification Parade Forms by his colleague or under the proper sections of the [*Evidence Act*](#), the Court cannot rely on such evidence. Therefore, mere production of the Identification parade Forms with no explanation to the Trial Court why the author did not testify so as to be subjected to cross examination by the Accused persons so as the Trial Court would test the veracity of the evidence and the demeanour of the witness, it cannot legally be relied upon by this Court even if from the record, the Accused persons did not object to the production of the said reports.

94. The Court agrees with the Appellant submissions that the mere production of the identification parade forms without the more was not sufficient to confirm identification parade were conducted and were according to the laid down procedures.



Recent Possession

95. In *Isaac Ng'ang'a Kabiga alias Peter Ng'ang'a Kabiga v. Republic Cr App. No. 272 of 2005(UR)* the court held that:

[Recent possession] 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.

96. In the case of *David Mugo Kimunge vs Republic CA 4 of 2014 [2015] eKLR* 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.

97. The robbery occurred on the night of 19th July 2015, PW1 confirmed theft of TV Make Braum, jacket 2 remote controls & DVD and produced receipt for TV -MFI -3. The same evidence of items stolen was confirmed by PW2, PW3 & PW4 PW7 went to the Complainants house that same night. They went to the Police Station and recorded statements. The report was relayed to Intelligence Officers and PW.2 was informed that the mobile numbers were operating near Sofia Market. PW.2 informed the Police of the incident and to check at road blocks. At 5am Police Officers at Kithimani called and said they apprehended 2 suspects with matching description of items stolen and one suspect had a Tv on his laps while in the Silker Shuttle. PW.7 and PW.9 arrested the 2 suspects and recovered TV, DVD 2 Remote controls and 2 mobile phones Itei, Samsung jacket and yellow bag. On searching the Appellant/1st Accused, PW7, found him with bus tickets dated 18th July 2015 from Nairobi to Matuu for Kshs 400/- and for Matuu-Nairobi of 19th July 2015 marked MFI-15 & MFI 16. PW8, Conductor of Silker Agencies Vehicle Reg KCC 363M confirmed on 19th July 2015 they left Matuu at 3am and at NYS roadblock they were stopped. The Police Officers enquired of passengers who boarded from Sofia and he pointed to the 2 men who boarded from Sofia, the Appellant 1st Accused and 2nd Accused.

98. The Police found TV Remote DVD Torch and black shoes. PW9 & PW10 on 19th July 2015 were on a roadblock at Yatta at night. They were informed of a robbery and were asked to inspect all vehicles passing through. At 5.35am, they stopped a Vehicle KCC 363 F Silker Agencies. PW9 went in and saw one of the Accused seated with a Tv on his lap covered with a jacket and he also had a yellow paperbag. The Appellant said he was with his witness 2nd Accused and he was taking the TV for repair. Passengers told him it was 2nd Accused who boarded with items and gave 1st Accused. The Accused persons were asked to disembark. PW9 & PW10 interrogated them and recovered TV, decoder, jacket, remote controls and yellow paperbag. They had mobile phones they claimed were theirs, Itel & Samsung. They handed them over to the Police from Matuu Police Station. Possession of stolen items by the Appellant and 2nd accused was positively proved by evidence of PW8, PW9 & PW10. The items were positively identified by Complainants and PW 1 produced receipt for the TV in Court during Trial. Search and seizure is where police or Law Enforcement Agencies on suspecting a crime is committed commence a search of a person's property and confiscate any relevant evidence found in connection



to the crime. Once goods are recovered an inventory is prepared. In the instant case the requirement for search and seizure was not necessary as the Accused persons were found in a public service Motor vehicle, identified by the conductor PW.8 and passengers and in possession of the stolen goods which were later identified by the complainants.

99. The evidence establishes recent possession of the stolen items during a robbery on 19th July 2015 night and these were recovered the early morning of 20th July 2015. There was no case of mistaken identity, as PW 8 identified the 2 Accused persons as the 2 people who boarded the vehicle from Sofia. On the account that the items were stolen during the robbery and were recovered in the possession of the Appellant, and indeed no rebuttal was offered by the Appellant. The Appellant defence failed to cast doubts on the Prosecution case due to the fact that goods stolen during the robbery were found with/on him and 2nd accused person. They were identified by PW.8 and passengers who did not know of the robbery.
100. The Appellant failed to give a reasonable account of possession of the stolen items both at the scene and in their defence in Court coupled with the fact that he was positively identified, the Court finds that the recent possession of stolen items without reasonable explanation by the Appellant and 2nd Accused is cogent and tangible evidence that the Appellant and 2nd Accused and another not in Court committed the offences charged.
101. In the view of the foregoing, having considered the evidence adduced in totality I am unable to find any ground that will warrant this court to interfere with the finding of the Trial Court. Consequently, I find that the appeal is without merit and the same is dismissed.
102. On the issue of the confession produced by PW.12 the Trial Court did not consider or rely on it, it was not of any probative value. Page 14 of the Trial Court judgment provides that;-

“I therefore have no doubt that the two accused persons were in the group of the persons who robbed the victims herein.

But even if there was some doubt, the subsequent event wherein the two were found in a Nairobi bound bus with some of the stolen items puts paid to any lingering doubts as to their involvement in the robbery. They were arrested within two hours of the robbery and found with the stolen items. The investigating officer was able to demonstrate through the phone records that the two were in constant communication with each other the previous day and therefore knew each other in spite of their claim to the contrary in their defence.”

The Trial Court relied on identification and recent possession of stolen goods only and not on the ‘confession’ by the Appellant as it is not referred to in the said Judgment.

103. The Appellant raised in the further submissions the issue that the 20 years sentence was harsh, unfair and disproportionate.
104. The Trial Court in its pre-sentence report indicated that the period in custody is duly considered but did not indicate the period the Appellant was in custody during trial until he was convicted. The Charge Sheet/Information shows date of arrest as 19/07/2015 and the Appellant and 2nd Accused person remained in custody until conviction or 20th March 2018 – 2 years and 8 months. Under Section 333(2) CPC the period in custody ought to be taken into account in computing the sentence of Twenty (20) years. It shall commence from 19/07/2015.
105. As a result, the Appeal herein lacks merit and is hereby dismissed save for the computation of the sentence whereby the 20 years imprisonment period shall commence from 19/07/2015.



It is so ordered.

DELIVERED SIGNED & DATED IN OPEN COURT VIRTUALLY ON 6TH DECEMBER 2021.

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

Joseph Musyoka Engau – Appellant – Present (virtual)

Geoffrey - Court Assistant

