REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

HIGH COURT CRIMINAL APPEAL NUMBER 206 OF 2015

JOSEPH MURIMI GITUSHO..... 1ST APPELLANT

MARY MUTHONI KARIUKI..... 2ND APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

(Being an Appeal against both the conviction and the sentence of Senior Resident Magistrate Hon. J. N. Nthuku delivered on 2nd September, 2015 in NAKURU CM Criminal Case Number 970 of 2011 Republic v Joseph Murimi Gituchu, Mary Muthoni Kariuki & 2 others)

J U D G M E N T

The appellants herein Joseph Murimi Gituchu and Mary Muthoni Kariuki were jointly charged with two (2) others for the offence of **Robbery with Violence contrary to Section 296(2) of the Penal Code**.

> *It was alleged that on 14th March, 2011 at Pipeline Area Nakuru, Nakuru District within Rift Valley Province, jointly with others not before the court being armed with dangerous weapons namely kitchen knife, robbed Joseph Kiilu motor vehicle registration number KBM 097Q Toyota Probox valued at Ksh. 600,000/= and at, or immediately before or immediately after the time of such robbery used actual violence to the said Joseph Kiilu.*

In the alternative Joseph Murimi Gituchu was charged with offence of **Being in possession of cannabis sativa (bhang) contrary to Section 3 (1) of the Narcotic and Psychotropic Substances (Control) Act Number 4 of 1994.**

> *It is alleged that on 14th March, 2011 at Pipeline area, Nakuru, Rift Valley Province he was found in possession of one hundred (100) rolls of cannabis sativa (bhang) with street value of Ksh. 1,000/= which was not medically prepared or authorized by the same Act.*

In her judgment dated 2nd September, 2015, the trial magistrate found the appellants guilty of the offence of Robbery with Violence and sentenced each to death. The first appellant was sentenced to two (2) years imprisonment for the 2nd Count but the sentence was held in abeyance in view of the death sentence.

It is against this conviction and sentence that the appellants have filed this appeal.

The first (1st) appellant filed five (5) Amended Grounds of Appeal on 29th July, 2019;

> *"1. THAT, the learned trial magistrate erred in law by awarding a conviction on a defective charge sheet.*
>
> *2. THAT the learned trial magistrate erred in law by awarding a sentence which was cruel, inhuman, harsh and degrading thus unconstitutional.*
>
> *3. THAT the learned trial magistrate erred in law and in fact by awarding a sentence but used the doctrine of recent possession of stolen goods; which was a wrong principle in law, it was an error in law.*
>
> *4. THAT the learned trial magistrate erred in law and fact by convicting me the appellant in a prosecution case that was poorly investigated, was full of contradictions thus not proved beyond reasonable doubt, prove of IDENTIFICATION was essential.*
>
> *5. THAT the learned trial magistrate erred in both matters of law and facts by misconstruing the circumstances of my arrest in connecting me with the purported stolen motor vehicle hence arriving at an erroneous finding".*

Together with these he filed his written submissions.

The second (2nd) appellant relied on seven (7) grounds of appeal;

> *"1. THAT the Trial Magistrate erred in law and fact in failing to fully evaluate the prosecution's case, the contradictory evidence thereto, the defence counsel's substantive submissions and the various relevant authorities cited hence making untenable legal and factual conclusions.*
>
> *2. **THAT** the Trial Magistrate erred in both law and fact in failing to find and hold that the circumstances of the purported identification of the Appellant were grossly unfavourable and could not have been free from error.*
>
> *3. **THAT** the Trial Magistrate erred in both law and fact in holding that the prosecution proved its case against the Appellant beyond any reasonable doubt such holding being fully and entirely repugnant to the contradictory evidence on record which evidence otherwise left myriad glaring grounds in the prosecution's case.*
>
> *4. **THAT** the Trial Magistrate erred both in law and fact in failing to find and hold that in the circumstances and the glaring serious contradictions in the prosecution witnesses' testimonies, the Appellant's purported dock identification was worthless an identification parade not having been conducted.*
>
> *5. **THAT** the Trial Magistrate erred both in law and fact in dismissing the Appellant's evidence on oath without assigning any proper or tenable reasons thereof.*
>
> *6. **THAT** the Trial Magistrate misdirected herself in failing to appreciate the fact that in law, the onus was on the prosecution to first prove its case against the Appellant beyond any iota of doubt before evaluating the appellant's defence to the charges and not vice-versa.*
>
> *7. **THAT** in totality, the prosecution completely failed to prove its case against the Appellant beyond reasonable doubt as by law required thereby rendering both the conviction and the sentence imposed herein both legally and factually entirely untenable.*

And also filed written submissions where he set out six (6) issues for determination;

> Ø Whether the evidence by the co-accused leading the police to the house of the appellant was

admissible.

Ø Whether the appellant herein was correctly identified as the perpetrator of the offence.

Ø Whether the conviction of the appellant in a case that was marred with inconsistencies amounted to injustice.

Ø Whether the prosecution met the standard of proof; beyond reasonable doubt.

Ø Whether the circumstantial evidence by the prosecution was properly linked.

Ø Whether the court was justified to proceed to convict the appellant based on a defective charge sheet.

The case for the prosecution is that Joseph Kiilu the complainant was an employee of Lilian Mwanzia, PW2 as a driver. Lilian was a business lady in the transport sector, and owned motor vehicle registration number KBM 097Q. It was used as a taxi and the complainant conducted his business along Kenyatta Avenue, Nakuru.

That is how on 14th March, 2011, around 8.00 p.m. he was approached by two (2) persons, a male and a female to transport them to Mwariki Area on hire. He had never met them before. They bargained fee and agreed at Kshs. 500/=. They paid Kshs. 200/= to enable him find the car. The balance would be paid on arrival.

The man occupied the back seat while the lady took the co-driver's seat. They fueled and drove to Mwariki. It was within that area, at Senta Academy that the woman pointed the complainant to a closed gate.The complainant drove there and stopped.

It was then that hell broke loose, suddenly the man seated in the back stabbed him on the left shoulder several times with a knife. He looked behind and tried to hold the attacker's hand. He tried to get out but the man held him by the shirt while still stabbing him. He tried to get out. The lady kept pulling him. He finally managed to open the door, *"and the man got hold of a bottle"*. He managed to get out but because the lady was still holding him, he was forced to leave the left side part of his shirt in the car. It was blue with other colours. He also wore a vest.

On leaving the motor vehicle he raised alarm. A watchman near there responded but the man took the wheel drove off towards the game park. He called PW2 and informed her. He was bleeding profusely. One Bonuke took him to Nakuru Police Post where he found that a report had already been booked. He was then escorted to Provincial General Hospital by a colleague, where he was treated and discharged.

He was later called by police and told that the motor vehicle had been recovered. He went and found the motor vehicle with the ignition key inside.

He was also told that some suspects had been arrested but did not see them at the police station. He testified that on the material date he had seen them clearly. That they were in light blue clothes when they boarded the motor vehicle.

He proceeded to identity exhibits, photos of the motor vehicle, the knife that stabbed him, a piece of shirt, the left side with stab marks and blood stains. He identified the two (2) appellants from the dock as the two (2) persons who had hired him on the basis that he had told the police that if he saw them he would be able to identify them. He said the stab wounds had healed leaving scars.

On cross examination he said he did business during the day but on this day he worked at night. That the motor vehicle was a registered taxi. Where he was parked there were "very bright" security lights from the shops and municipal council; that they spoke outside the motor vehicle for about eight minutes; that there were lights at the gate where they stopped; that he left the other **piece of shirt** which was blood

stained at the hospital; that at Mwariki Police Post he described the people who attacked him as short small light girl, but did not tell his friend Isaac the first person he called how his attackers looked like.

PW2 No. 231648 C.I. Sambu Wafula was the Crime Scene Officer who took photos of the motor vehicle registration number KBM 097Q Toyota Probox at Nakuru Police Station.

PW3 Lilian Kanuthia Mwakea testified that she was the owner of the said motor vehicle. She said the car had a tracking device. When she learnt it had been stolen, she reported to the car tracking company. The police were also informed. Motor vehicle was tracked to Stem Hotel area. The police recovered it and called her to record a statement. On cross examination she said that complainant told her he did not know the robbers, that motor vehicle was not registered as a taxi with Municipal Council of Nakuru, she did not have car tracking certificates/evidence of paying Municipal Council of Nakuru dues. PW4 Dr. Sammy Getiti filled the P3 for complainant. It was issued on 15th March, 2011 and he alleged to have been carjacked by robbers and injured. He examined him on 19th July, 2011, four (4) months after the attack. He said he got the history from the complainant who did not even have the treatment notes or any prescription for medicine.

Despite that he said complainant had general stab wound on the left shoulder at the back and probable weapon was sharp. He said the complainant was stitched and given analgesics. He said there was a scar.

PW5 No. 62967 James Kimanda was on night shift duty with flying squad Nakuru when on 14th March, 2011 he received information of the robbery of motor vehicle registration number KBL 097Q Toyota Probox. He said the complainant gave a tracking number that tracked motor vehicle to a parking near Stem Hotel. He moved to Stem Hotel and was led by the car track into a compound fenced with off cuts and the car packed in front of a house.

This is what followed in his own words;

> "*We entered the house and the door was opened slightly so we opened it and found 2 men in the room Duncan Ndungu and Joseph Murimi. We introduced ourselves and Joseph didn't resist he said the motor vehicle belonged to Mary Muthoni. He gave us the key to the vehicle and we asked where Mary Muthoni was. He said she is the next house. We searched Murimi's house because of the robbery report since the complainant had been given certain substance to take to lose consciousness. Inside the house we found this. The person had also been stabbed so we received this knife inside the house. Knife – PMFI 4. This is the substance we received in a bottle- liquid. We received 100 rolls of bhang PMFI 7."*

In cross examination he said that the complainant was given a chemical but remained conscious, that neither the shirt not the car had any blood stains.

PW6 No. 60997 PC Daniel Njuguna testified that he received report of robbery of motor vehicle registration number KBN 097Q. He was on patrol with his colleagues on the material night. He said the tracking instructions led them to a compound with petrol tanks with the motor vehicle parked at one end outside a room which had lights on and the door was ajar. They joined PW5's team. When they went to the 2nd appellant's house, he said she *'admitted'* to being Mary Muthoni, and was identified as Mary Muthoni. On cross examination he said he was the investigating officer but did not conduct identification parade. He said he did not see the complainant on the night of the incident, and did not know where he obtained treatment from. He said he visited the scene and found it was a road with no street lights. That the shirt and knife had no blood stains when they were recovered.

The appellants were put on their defence.

The 1st appellant told the court that he was a shopkeeper with an MPESA till and he was arrested while actually going to report a case where an Mpesa customer had given him fake money. The 2nd appellant said she was coming from work when she met the police officers near Magic Supermarket. They arrested

her and charged her with the offence.

This being a first appeal the appellants are entitled to a review, and re-assessment of the evidence and for this court to draw its own conclusions.

I have carefully considered the submissions written by 1st appellant, written and highlighted orally by counsel for 2nd appellant Mr. Maina, and the responses by the state. The issues for determination are set out clearly in the submissions.

1. Whether the charge sheet is defective.

2. Whether the elements of the offence of Robbery with Violence were proved beyond reasonable doubt.

3. Whether the trial magistrate erred in the application of the doctrine of recent possession.

On the first issue, there is no doubt that the charge is defective. One crucial element of robbery with violence is **Theft**, the stealing of the things from the complainant. If that core ingredient is not in the charge sheet how then can an accused person be expected to properly put up his defence.

Section 295 of the **Penal Code** defines **Robbery** in general;

> ***"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."***

Section 296(2) is evidently a continuation of something, it starts with 'if'.

> ***"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".***

Hence it was of utmost necessity that the **Section 295** be read with **Section 296(2)** of the **Penal Code** for the charge of Robbery with Violence to stand properly against the appellants. The trial magistrate recognized this but proceeded to find that from the particulars of the charge the Appellants became aware of what they were facing and therefore they did not face any prejudice. She found that he said omission was excusable under **Article 159 (2) (d)** as a procedural technicality.

The trial magistrate is the receiver of all primary evidence. She hears and sees the witnesses, even visits the scene of crime, she gets the first impressions of the witnesses and accused persons, demeanour as we call it, she must of necessity determine the facts and applicable law in the first instance, she has the prime duty to analyse the evidence with scrutiny to determine whether it meets the **bar,** in default of that such unsafe convictions occur.

The two appellants each argued that the trial magistrate was in error. Relying on **Section 214** of the **Criminal Procedure Code.**

> **"Variance between charge and evidence, and amendment of charge**
>
> **(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:**

Provided that—

(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.

(3) Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary."

It was argued for the first appellant that prosecution had an opportunity to amend the charge but failed to do, leaving the fatal flaw intact. The trial magistrate ought not to have given this the legal authority by convicting the appellants on the same.

Further that **Article 50 (2) (b)** of the **Constitution** is categorical that it is a tenet of fair hearing that an accused person has *"the right to be informed of the charge with sufficient detail to answer it"."*

The appellants relied on **Yosefu v Uganda [1969] EA 236**

Sigilani v Republic (2004) 2 KLR 480 held that *"A charge sheet is fatally defective if it does not allege an essential ingredient of the offence. The principal of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence."*

B.N.D v Republic [2] eKLR *"the learned judge was categorical that "The test of whether a charge sheet is fatally defective is substantive one; was the accused charged with an offence known to law and was it disclosed in a sufficiently accurate fashion to give the accused adequate notice of the charges facing him? If the answer is in the affirmative, it cannot be said in any way other than a contrived one that the charges were defective".*

Be that as it may the provisions of **Section 382** of the **Criminal Procedure Code** are clear.

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

The proviso urges the court to establish whether the said defect occasioned a miscarriage of justice. Did that happen in this?

The trial magistrate found that the particulars of the charge were very specific and gave sufficient detail to enable the appellants make their defence. I have read through the proceedings, vis a vis the charge sheet. It is clear that the appellants were aware that the allegations against them were that they had stolen the said motor vehicle from the complainant, using force and, that they were armed with a knife.

Hence, although the charge sheet was indeed defective, I am not persuaded that that defect occasioned a miscarriage of justice.

On the second and third issues, it was submitted by both appellants that the evidence before court was inconsistent, contradictory and insufficient to support the charges, it was also argued that there was no identification, and the magistrates had misapplied the doctrine of recent possession.

Was any theft committed against the complainant?

First and foremost there was no evidence that the motor vehicle belonged to PW2, she produced no log book/registration documents to prove the same.

Secondly, it is not in dispute that there was no eye witness to the robbery. The complainant's testimony that he was able to identify his attackers is not corroborated by any other evidence, the averment that he would be able to identify them later if he saw them cannot stand in a criminal case where the standard of proof is beyond a reasonable doubt.

It was 8.00 p.m. He said there were lights and they spoke for 8 minutes. There is nothing to support the allegation that they spoke for 8 minutes, about what? 8 minutes is a long time to be discussing the cost of a taxi ride, yet these are people who were not known to him.

Secondly his evidence that there was light was contradicted by the investigating officer who told the court he visited the scene found a dark street without lights. Which is which, even if there were lights, his allegations that it was as bright as day is not supported by any other evidence, he could not describe their clothing, nor could he describe their appearances beyond that of the second appellant, as a small, light person, a description that could have fitted anyone. He would have given a description to the first person he called at the police station when he booked his report.

The appellants cited among other cases Charles **Maitanyi v Republic [1986] KLR 198**, to support the notion that the prosecution relied on the identification evidence of a single witness, which the trial magistrate did not interrogate. I find it necessary to cite from **Roria v Republic [1967] EA 583** where the court stated;

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

The judge did not stop there. As submitted by the second appellant, they admonished courts to exercise the greatest caution and circumspection before convicting on the testimony of a single identification witness.

In this case, it is the evidence of the complainant who had never met these people before but who could only say in court that he only told the police officer if he saw them he would identify them. How would the police know they were the ones without any prior description? That is the point that was so well

articulated in **Maitanyi.** I am bound to repeat the words of the court here;

> *"It must be emphasized that was is being tested is primarily the impression received by the single witness at the time of the incident. Of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of light available. What sort of light, its size, and it position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, state counsel and defence counsel. In the absence of all these safeguards, it now becomes the great burden of senior magistrates trying cases of capital robbery to make these enquiries themselves. Otherwise who will be able to test with the 'greatest care' the evidence of a single witness?"*

It is evident from the trial court's analysis that this issue was not tested at all. If indeed the complainant could identify these people why was there no record of the same? Secondly the only other means of confirming that he could indeed identify them would have been an identification parade. The investigating officer found no reason for the same and chose to rely on dock identification without any basis at all.

Hence the evidence of identification as given by the complainant was not reliable.

The trial magistrate relied on the doctrine of recent possession.

The Second appellant relied on **Isaac Ng'ang'a Kahiga v Republic [2006] eKLR** where the Court of Appeal laid out the basis upon which a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case. **Possession must be positively proved. How?:-**

Ø Property was found with the suspect.

Ø Property is positively identified as the property of the complainant

Ø Property was recently stolen from complainant

Was property found with the appellants? The evidence of the two police officers is that motor vehicle was parked in a yard where there were tankers but in front of a house which had lights and whose door was ajar. According to them that was the first a sign that the people inside that house knew something about the said motor vehicle. Upon going in they found the first appellant and others smoking bhang. It is their evidence that the first appellant gave them the car keys. That evidence is challenged by the first appellant. That there was no evidence of recovery, no inventory was made by the officers to confirm that the motor vehicle and the car keys were found with him.

Relying on **Section 57** the **National Police Service Act**, the second appellant argued that it was a requirement of the law that the officers who entered his house and allegedly recovered the car and keys from him to fill out an inventory. **Section 57** gives an officer powers of entry and search without a warrant but under **Section 57 (s)** it is mandatory for a police officer to among other things;

Ø Record the action

Ø Record the items taken

Ø Make a report of it available to his superior

Without any corroborative evidence there is only the allegations of the police officers that the first

appellant gave them the keys to the car. An inventory would have gone a long way to corroborate this evidence.

It is also alleged that first appellant led to the arrest of the second appellant, saying that she was the owner of the said motor vehicle. The officers are saying in other words that the first appellant was found with the motor vehicle and told them no, *gari si yangu ni ya Muthoni*, and then took them to a house where they found a lady whom they arrested because she admitted she was the Muthoni the owner of the stolen car. All this is denied. Where then is the proof that indeed the first appellant said the words put to him and led to Muthoni's arrest? There are people who are alleged to have been found with Muthoni, who also identified her, where is their testimony? Clearly that evidence was not corroborated. It is evidence that is inadmissible as it offends the provisions of **Section 25A of the Evidence Act Cap 80 Laws of Kenya**. In any event the first appellant's evidence against the second appellant was never put to test. The police alleged, and the trial magistrate relied on it, and proceeded to convict her on such "evidence"

I agree with the submissions of the second appellant that that evidence was inadmissible, a position supported by the case of **Joseph Odhiambo v Republic** that the evidence of a co-accused is "*evidence of the weakest kind*."

Did the complainant prove ownership?

Neither the complainant nor PW2 proved that the motor vehicle belonged to either of them. There was no evidence of the alleged car tracking documents, receipts for payment to Municipal Council of Nakuru, or even registration in the names of PW2 and a bank. Secondly was the motor vehicle KBM, KBL or KBN 097Q, these were the various descriptions of the motor vehicle used during the trial.

Was the motor vehicle stolen from the complainant?

The evidence of theft is founded on the attack f the complainant outside the closed gate where he says he was directed by the appellants. The complainant said that one of the robbers stabbed him severally from the back with a sharp knife and he was bleeding profusely. That the lady robber at the front pulled him by the shirt so violently that he left half his shirt in her hands leaving the other half on his body.

Strangely there was no blood in the car. Neither was the piece of shirt that was recovered stained with any blood. In addition, the investigating officer alleged that the complainant was made to drink a chemical which rendered him unconscious. The complainant gave no such evidence, except that he said he saw the male robber with a bottle but never said he was made to drink from it. In any event at no point did he fall unconscious. It was his testimony that he came out of the car, raised alarm, was rescued by a friend, taken to the police station and then hospital. There was a watchman at the scene. No one spoke to him. Secondly on this point the investigating officer made no effort to submit the alleged chemical to government analyst to ascertain its contents. Hence the complainant's testimony of the alleged theft was not supported by any evidence.

There was no evidence that the complainant sustained any stab injuries. The medical evidence was not credible. The complainant was examined four (4) months after the alleged incident. The complainant did not present any treatment documents, or anything to prove that he been in a serious robbery four (4) months earlier. No one from the police could vouch for the alleged fact that he was bleeding profusely when he arrived to report the case. With the above inconsistencies and contradictions the evidence failed the test of beyond a reasonable doubt. The prosecution did not prove that the complainant was robbed of the motor vehicle.

What about the doctrine of recent possession?

The 1st appellant further submitted that the arrest was unrelated to the robbery. The police said they followed the tracking device t a parking lot where there several tankers and the m/v parked. There was a house whose door was ajar. They entered. The house was full of smoke as the occupants were smoking

bhang. A hundred (100) rolls of bhang were recovered. And he was arrested. There was no connection with the stolen motor vehicle. The alleged car tracking evidence was not provided to prove indeed that the car had left its usual parking place to the petrol station and to the gate near Senta Academy, and how it ended up in the parking yard where there were other motor vehicles and the house where it is alleged to have been recovered. The tracking device evidence was crucial to the case for the prosecution. The fact that it was not produced leads to the inference that it did not exist and if it did, it did not support that case for the prosecution. There was no evidence that the appellants were found in possession of the motor vehicle. Hence the trial magistrate misapplied the doctrine of recent possession.

There was no investigations in this case. No positive identification of the robbers as there was no identification parade. No physical or medical evidence to support the alleged of stabbing. No ownership documents or inventories of exhibits. No car tracking evidence. Evidence riddled with contradictions and inconsistencies.

From the foregoing the only conclusion available is that the appeal succeeds. The conviction against each of the appellants is quashed. Each sentence is set aside. Each appellant be set at liberty unless otherwise legally held.

Dated, delivered and signed at Nakuru this 20th day of January, 2020.

Mumbua T. Matheka

Judge

In the presence of

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