



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO. 6 OF 2018

KABOI MAGAL.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Kabarnet Cr. Case No. 880 of 2016 delivered on the 9ths day of January, 2018 by Hon. S.O. Temu, PM]

JUDGMENT

1. The appellant was convicted and sentenced to concurrent sentences of imprisonment for ten (10) years for each of five (5) counts of robbery with violence contrary to section 296(2) of the Penal Code whose particulars were set out in the Charge Sheet dated 21st September 2016 as follows:

“COUNT I

CHARGE: ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296 (2) OF THE PENAL CODE

PARTICULARS OF OFFENCE: KABOI MAGAL. On the 29th day of June 2016 at around 6:00

Am at Dodukabei village in Baringo South Sub-County within Baringo County, jointly with others not before the Court, while armed with dangerous weapons namely AK47 riffle robbed ISAAC NGUGI of Ksh cash 12,000 and immediately after the time of such robbery wounded the said ISAAC NGUGI.

COUNT TWO

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296 (2) OF THE PENAL CODE.

PARTICULARS: KABOI MAGAL. On the 29th day of June 2016 at around 6:00 am at Dodukabei village in Baringo South Sub-County within Baringo County jointly with others not before the Court, while armed with dangerous weapons namely AK47 riffles, robbed DAVID KAMAU of cash Ksh 10,000, Torch, all valued at Ksh 13,200 and immediately after the time of such robbery wounded the said DAVID KAMAU.

COUNT THREE

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296 (2) OF THE PENAL CODE.

PARTICULARS: KABOI MAGAL. On the 29th day of June 2016 at around 6:00 am at Dodukabei village in Baringo South Sub-County within Baringo County jointly with others not before the Court, while armed with dangerous weapon namely AK47 riffles robbed MORRIS KIMITA of cash Ksh 15,000 and Itel Mobile Phone worth Ksh2,000/= and immediately after the time of such robbery wounded the said MORRIS KIMITA.

COUNT FOUR

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296 (2) OF THE PENAL CODE.

PARTICULARS: KABOI MAGAL: On the 29th day of June 2016 at around 6:00 am at Dodukabei village in Baringo South Sub-

County within Baringo County, jointly with others not before the Court, while armed with dangerous weapons namely AK47 rifles, robbed JAMES GITAU of Ksh cash 5,000/= and immediately after the time of such robbery wounded the said JAMES GITAU.

COUNT FIVE

ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296 (2) OF THE PENAL CODE.

PARTICULARS:KABOI MAGAL: On the 29th day of June 2016 at around 6:00 am at Dodukabei village in Baringo South Sub-County within Baringo County, jointly with others not before the Court while armed with dangerous weapons namely AK47 rifles, robbed ISAAC NJOROGI of cash Ksh 8,000, Nokia mobile phone, all valued at Ksh11,000/= and immediately after the time of such robbery, wounded the said ISAAC NJOROGI.”

2. By his Petition of Appeal dated 29th January 2018, the appellant appealed from the sentence only, seeking a reduction thereof and clarifying that he did not challenge the conviction as follows:

“Being an appeal against conviction and sentence for the offence of robbery with violence contrary to section 296(2) of the Penal Code. Judgment delivered by the trial Magistrate Hon. S. Temu (PM) at Kabarnet on 09-01-2018. I beg to appeal on the following grounds:

MITIGATION FOR LENIENCY

1. **That, My Lord I am not challenging conviction.**
2. **That, My Lord I am very remorseful over the matter.**
3. **That, My Lord I request to be considered as a first offender.**
4. **That, I have been in remand for one and half years.**
5. **That, I have learned a lot in Prison and I am aware of the consequences of not abiding by the law.**
6. **That, I have consequently changed to be honest and serve as an example to educate and advocate peace in the community where I come from.**

Reasons wherefore

I pray that my appeal be allowed conviction quashed, sentence set aside and set free at my liberty.”(sic)

3. At the hearing of the appellant, without prior leave of Court, introduced Amended Grounds of Appeal challenging both the conviction and the sentence as follows:

“AMENDED GROUNDS OF APPEAL

An appeal arising from the original conviction and sentence in case no. 88 of 2016 judgment on 09/01/2018 by HON. S.O. TEMU (PM) at Kabarnet Law Court for the offence of robbery with violence contrary to section 296 (2) of the Penal Code, sentenced to serve 10 years imprisonment. Being amended ground of appeal from appeal of mitigation to appeal against conviction and sentence as provided by section 350 (2) of the Criminal Procedure Code that after perusal of the certified copies of my original trial Court proceedings I wish to amend my ground as follows:

1. I am aggrieved that the trial Court erred in law and facts by failing to grant fair trial in respect of this matter.
2. The trial magistrate erred in law and facts by failing to hold that the charged-sheet was defective.
3. **The trial magistrate erred in law and facts by failing to observe that this matter was not proved beyond any reasonable doubt.**
4. I am aggrieved that the trial Court erred in law and facts by shifting the burden of proof to the appellant.
5. I am aggrieved that the trial Court erred in law and facts by failing to hold that all the evidence tendered in respect of this matter was filled up of inconsistent sentiments.

REASONS WHEREFORE: I the appellant prays that may my appeal be allowed, **conviction and sentence quashed** and I be set free.” (sic)

4. The appellant filed corresponding written submissions on the newly Amended Grounds of Appeal.

5. The DPP did not oppose the introduction of the new petition and grounds of appeal challenging both the conviction and sentence, and the Ass. DPP went to make oral submissions in opposition of the appeal as follows:

“Appellant

I have written submissions. I do not wish to add to the submissions. I will respond if need be after DPP submissions.

DPP

Appeal is opposed.

Appellant convicted for 5 counts of robbery with violence contrary to section 296 (2) of the Penal Code and sentenced to serve 10 years in each concurrently.

Appellant with others not before Court is alleged to have robbed 5 people and inflicted injuries.

Pw1 was robbed Ksh.12,000/-, Pw2 10000/- and Nokia phone valued 13,200/=, Pw3 Ksh 5000/=, Pw4 Ksh.8000/= and Nokia Phone worth 3000/=, Pw7 Ksh.15,000/= cash and Intel Phone valued at 2000/=.

The 5 complainants testified that on 28/6/2016, they left Laikipia with 10 donkeys to Mukutani market to sell them there. On 29/6/2016, they woke up early and started their journey back to Laikipia. After travelling for about 7 Km they met three men who robbed them their valuables and also attacked them. They were armed with 2 guns and sticks.

They also took their 10 donkeys.

The 3 men ordered them to remove all their clothes. They recovered the money for their clothes and they used the sticks to cane them on their backs.

They were then ordered to pick their clothes and run and they run in different directions. All the complainants said they were able to identify two assailants and one of them was the appellant.

The incident happened at 6.00am and there was light. The 2 assailants were identified by the complainant as they were their customers. They used to bring their wares at Makutani market.

Pw1 testified that as he ran away he heard gunshots fired. On the way in the bush he met Pw2 and they started following the donkey's footprints. The footprints led them to a house where they were 3 men. One of the men was called Kenyangati and the other one was the appellant and they did not identify the 3rd person.

They had identified the appellant and the said Kenyangati at the time of the robbery. When the 3 men saw Pw1 and Pw2 the said Kenyangati came out of the house armed with a gun. The two witnesses ran and reported the matter to the chief.

Pw3 stated that after they were robbed he ran in the bushes and he reached Makutani Centre at 1.00pm. He reported the matter at Marigat Police Station and the police started searching the donkeys. All the 5 complainants identified the appellant in an identification parade. All the 10 donkeys were recovered at the appellant's house.

The 5 complainants had injuries which were treated and Pw9 Clinical Officer who treated them confirmed that they had injuries.

Apart from the donkeys all the other property was not recovered.

In his defence, appellant stated he was arrested at Makutani as he took his wife to hospital and did not know anything to do with the case. The appellant was a person known to the complainants as their customers and that is the reason why they all identified him at the Identification parade.

All the ingredients of robbery with violence were proved as they were armed with guns.

The sentence of 10 years imprisonment is lenient and in urge Court to dismiss the appeal.

Appellant in reply

I did not do the matter as submitted by the DPP. I ask the Court to consider the evidence.”

Leave to Amend Petition of Appeal

6. Section 350 (2) of Criminal Procedure Code is in the following terms:

“350 (2) A petition of appeal shall be signed, if the appellant is not represented by an advocate, by the appellant, and, if the appellant is represented by an advocate, by the advocate, and shall contain particulars of the matters of law or fact in regard to which the subordinate Court appealed from is alleged to have erred, and shall specify an address at which notices or documents connected with the appeal may be served on the appellant or, as the case may be, on his advocate; and the appellant shall not be permitted, at the hearing of the appeal, to rely on a ground of appeal other than those set out in the petition of appeal:

Provided that—

(i)....

(ii)...

(iii)

(iv) save as provided in paragraph (i), **a petition of appeal may only be amended with the leave of the High Court and on such terms and conditions, whether as to costs or otherwise, as the High Court may see fit to impose;**

(v) notice in writing of an application for leave to amend a petition of appeal shall be given to the Registrar of the High Court and to the Attorney-General not less than three clear days, or such shorter period as the High Court may in any particular case allow, before the application is made; and an application for leave to amend a petition of appeal shall be made either at the hearing of the appeal or, if made previously, by way of motion in open Court.

[Act No. 57 of 1955, s. 10, [L.N. 124/1964](#), [L.N. 280/1967](#), [Act No. 12 of 2012](#), Sch.]”

7. However, with no objection by the DPP and in the interests of justice underpinned by Article 159 (2) (d) of the Constitution, and the obligation of this Court as a first appellant Court (see **Okeno v. R** (1972) EA 32) to reevaluate the evidence before the trial Court, this Court has examined the evidence presented before the trial Court to make own conclusion on the evidence before considering whether the decision of the trial Court on conviction is to be upheld or quashed.

Evidence before the Court

8. The evidence of the prosecution witnesses before the trial Court was as follows:

PW1

My name is Isaac Ngugi.

I am resident of Laikipia County.

I am businessman.

On 28/6/16 at 4 am I left home to Mukutani market where I sale food staff.

I closed in the evening and I slept and at 5 am I woke up with Morris, Kimita, David Kamau and James Gitau.

That was on 29/6/16.

We went for about 7 km while driving 10 donkeys we had met 3 people at Kabei.

I knew two of them as Kaboi and Kanyangati as they were our customers.

I did not know the 3rd person.

The two had guns.

When we reached closer they asked us to remove all that we had and place them down and we were required to remove our cloths and lie down.

Kanyangati is the one who ordered us to remove cloths.

We had removed the money we had and placed it on the ground together with our cloths.

The two had caned us as the other man ransacked our cloths.

We were caned on the back.

I was injured on the back and ribs.

The three had given us our cloths.

The three worked out and one of them asked the others not to shot us.

They asked us to take our cloths and go and we were not to follow the road as there were other robbers on the road.

The two had fired two pullets.

I went and when I reached the road I saw David Kamau and we walked together as we followed the donkeys foot prints.

We had seen Kimita on the way with the area chiefs informer and we continued to follow the donkeys.

The informer led us to Kanyakati's home and when we went there we found him there taking tea.

The Chief's informer entered into the house and he left us outside.

He came back and he informed us that he was asked why we had gone to that home.

Kanyangati was with two other men.

Kanyangati went into the house and came out with a gun and we ran away.

We went to the centre and we went to Mukutani police station where we reported the incident.

We went to the chief's office and we reported.

The informer had given the names of the suspects to the chief.

The chief had summoned elders and the donkeys were returned after four days.

We recovered all the 10 donkeys from the elders.

The elders did not tell us as to where they found the donkeys.

I was treated at Marigat Sub-county hospital.

The p3 form for Isaac Ngugi is marked as Mf1 P1.

I had lost ksh 12,000/= and a torch.

The accused before Court is Kaboi and I used to know him as my customer and he had a gun and a stick when he robbed us.

Accused is identified in Court.

S O TEMU, PM

CROSS-EXAMINATION By Accused

In Pokot and English.

I wish to read the 1st report before I ask any questions.

Court – accused to be supplied with the 1st report before Cross-Examination.

Matter is adjourned to enable the accused be supplied with that 1st report.

Pw1 male adult still under oath for Cross-Examination.

We were robbed at 6 am.

I know you as you were my customer.

I don't know your age.

When I recorded statement and report at the police station I stated that it was Kanyagati and Kaboi.

We went to the fence to the home where the donkeys were.

We had found you (Kaboi) and Kanyagati at the home where you were taking tea.

Kanyagati had asked the informer as to why he had taken us to that home and Kanyagati had come out with again and he chased us.

The people who robbed us had guns.

We did not have guns.

We were following the foot prints when we came to your home.

The donkeys were given to us by the elders when the chief sent them to look for them.

I know you well as my customer.

You purchase potatoes, maize and beans from me.

You have purchased for many times.

I have no evidence that you are my customers.

I had given your names when I reported the incident.

I am not lying I gave your names.

“The first report is read in Court and it indicated that the complainants were robbed by Pokot men.”

I had given your names Kanyati and Kaboi.

S O TEMU, PM

Prosecutor – No Re-examination

S O TEMU, PM

Pw2 male adult is sworn.

My name is David Kamau.

I am a resident of Kinamba at Laikipia.

I am a businessman and a farmer.

I sale horticulture at Mukutani using Donkey.

On 28/6/16 I had left home at 4 am to Mukutani market and reached Mukutani at 10 am.

We sold our wares up to the evening.

At 5pm we gathered as business men and we agreed to sleep and we left Mukutani at 5am.

I was with Njoroge Kimita and Gitau.

We had met some men who were three.

The three men had left the donkeys to go ahead and they emerged from the bushes.

The group had ordered us to put all that we had down.

We had removed money mobile phones and torches.

The three were not satisfied and they had asked us to lie down and remove our clothes.

I knew the two person out of the three.

The two are Kaboi and Kanyagati.

The accused who is before Court is the one who caned us whereas Kanyagati checked our clothes and the other man stood watch.

The accused herein and Kanyagati had guns and sticks.

The accused who is before Court had caned us on the back and head.

The accused herein had intended to kill us when he removed everything that we had.

The accused had asked us to kneel down and he wanted to shot us when one person came to our rescue

When the accused stated that he wanted to kill the fools. {kasia}

The other person convinced the accused not to kill us.

They had asked us to take our clothes and run away.

We ran away and I had met Kimita.

The accused had fired two rounds to the air as we ran.

We had later met Ngugi at Legati river.

We had met one person by the name of Kokoni and we informed him that we had been robbed and we asked him whether he knew Kanyagati's home and he stated that he knew.

The said Kokoni led us to Kanyagati home and when Kanyagati saw us he asked Kokoni why he had taken us there.

Kanyakati had entered into the house and he came back with a gun and he shot two rounds at us as we ran away.

We had ran to the road and we went to Mukutani centre where we found Njoroge but Gitau was not there.

We went to Mukutani area where we reported the incident.

We had 10 donkeys.

After some time we found the donkeys at Kanyakati's home and we informed the chief and after two days all the donkeys were given to us.

I lost ksh 11000/= which I had sold that day and Nokia phone 1100 and one torch which was black in colour and it was using 3 cells.

I was injured on the back and leg as I ran away.

I was treated at Marigat sub-county hospital

I was issued with treatment notes and P3 form.

The treatment chits/card in the name of David Kamau are identified in Court and the p3.

The card and p3 are marked as MF2 a & b.

The donkeys that were stolen and recovered were photographed.

The donkeys are identified from the photographs are marked as MF P3 a & b.

I knew Kaboi and Kanyagati before the attack.

The two had attacked us in the morning hours when there was no darkness.

I knew Kaboi at Mukutani.

We had sold our goods at Mukutani for one year and the accused was our customer as they used to buy goods from us while in the company of their wives.

The incident had taken about 20 minutes.

We were summoned to Marigat police station where an Identification parade was conducted.

Identification parade form is shown to the witness.

I participated in the Identification parade.

The accused was in the parade.

He was with 6 to 7 (seven) other men.

The OCS used to call us out and ask us whether we could identified any other men.

I was with David Kamau and Gitau & Ngugi & Kimita and Njoroge when we went to pick persons at the parade.

The Identification parade form is identified and marked as MFI P4.

S O TEMU, PM

CROSS-EXAMINATION By Accused

I know you by name of Kaboi.

I don't know your home but I know Kanyagati's home where we found the donkeys.

We were four when we reached Kanyagati's home at 8 am.

We ran away after the gun shots.

Mukutani was about 6 to 7 kilometres from where we were attacked.

I cannot estimate the distance from the scene to where we found the donkeys as it was in bushes.

We went to Mukutani and we reached there at 1 pm.

Mukutani is where we reported the incident.

We went to the hospital at Marigat the following day.

I am not lying against you.

I know you.

The person in whose home we found the donkeys is not in Court..

The gun was never recovered.

The stick was also never recovered.

I had lost money ksh 11000/= mobile phone and torch.

They were not recovered.

The donkeys were recovered but other items were not.

The chief is the one who sent elders who recovered the donkeys.

I don't know all the elders who recovered the donkeys but I know Letakor.

The donkeys were 10 in number.

The donkeys were not 12.

The witness's statement is read in Court and it indicated that donkeys were 12.

It is not true that we had 12 donkeys.

I don't know why the police have not arrested the person in whose home the donkeys were recovered.

I am not framing you.

You are before Court because you are the one who robbed us and went with our donkeys.

I don't know why it took many days to have you arrested but I had reported.

We were inquiring whether the other items were recovered as we could not follow up on our own.

We did not go to your home for search.

S O TEMU, PM

Prosecutor –Re-Examination

The donkeys were 10.

2 were mine.

Ngugi had 2.

Kimita had 2.

Njoroge had 2 donkeys.

Gitau had 2 donkeys.

Kimita has 5 donkeys and he lease out three and he used two.

Ngugi has three donkeys and he leases 1 and he used 2.

I have my two donkeys.

Pw3 male adult is sworn.

My name is James Gitau.

I am resident of Kinamba.

I am businessman.

I sale items in different markets including Mukutani.

I knew the accused who is before Court.

The accused is my customer for the last one year.

He used to purchase goods from me for the last one year when he used to come with his wife.

I know him by names as Kaboi.

On 28/06/16 we planned to go to the market with my friends. We started our journey at 9 am while using 10 donkeys.

I was with Njoroge, Kimita, Kamau and Ngugi.

We reached Mukutani market at 10 am and we started selling our wares.

I cleared my work at 4 pm and others cleared at 5 pm and we decided to sleep at Mukutani and we woke up at 5 am and started our journey back.

We travelled on bush road and at about 6 am we had met three men at Dudu Kabei.

I was able to identify Kanyagati and Kaboi when the three men came but I did not identify one.

The three asked us to stop.

Kaboi had asked us to put all that we had down.

We placed our money mobile phones and torches down. We were asked to lie down.

Kaboi and Kanyagati had guns and the other man had a club.

We were assaulted and I was injured on the back.

Kaboi asked us to kneel down and put our hands on the head.

I had heard the gun sound of preparation to shot.

I had heard the person who I did not know asking the other two not to kill us.

They asked us to carry our clothes and ran away.

I had ran and I heard two gun shots.

I stayed in the forest upto 1 pm and I went to the centre and I met my other friends who informed me that they had reported the matter.

We then decided to go home and after four days I received a report that the village elder had followed the matter and recovered the donkeys together with the chief.

I had lost my phone Nokia, one torch and ksh 5000/=.

I was treated for the said injuries at Marigat Sub-county hospital.

I was issued with treatment notes and p3 form.

The p3 is marked as MfI P5.

I was able to identify the three men as there day had broken and the sun had started to shine.

The incident took place for about 15 minutes.

I was summoned by the OCS Marigat for Identification parade.

I had signed on the Identification parade form. The form for James Gitau is marked as MfI P6.

The donkeys that were recovered were photographed.

The 10 donkeys are identified from MF3a & b.

S O TEMU, PM

CROSS-EXAMINATION By Accused

You were wearing blue T-shirt.

You were not wearing any cap.

You were wearing a sheet as short.

You had fired the gun shots after the robbery.

I had travelled in the bushes until I found the road to Mukutani.

The other three colleagues had reached Mukutani first.

I did not seat anywhere when I went to Mukutani.

I had taken more hours to reach Mukutani because I had entered into the bushes after the gun shot and it took me time to trace the road to Mukutani.

I reached the police station at 1 pm.

You are the one who was giving directives in Pokot.

You were also mixing Kiswahili.

As you robbed us and seat us up you were talking in Pokot and when they addressed us you talked in Kiswahili.

You are the one who ordered us to lie down.

You were speaking in Kiswahili then.

You will be lying if you say that you completely don't know Kiswahili.

I was not there when the donkeys were recovered.

Kamau and Kimita were the ones who were there when the donkeys were recovered and he rung us.

Later I was informed by my friends that it was the chief and elders who had recovered the donkeys.

I was informed that the donkeys were first seen at Kanyagati's home and the two friends were fired at and they had left them there.

When we met at Mukutani with the other friends the donkeys had been seen at Kanyagati's home.

I am telling the truth.

We are not blaming you because we have done business with you for about one year.

We place our wares separately at the pocket.

We were selling different items at the market and you were purchasing items from all of us.

I have stated that you are my customer and I knew you well.

When I went to the police station I stated that thugs had attacked us and I had I identified two of them.

I stated that at the police station.

Your names were not indicated in the Occurrence Book as when I reached Mukutani I had found that my colleagues had reported the matter at the Occurrence Book.

I recorded my statement later after 3months.

I was injured after the attack.

I went to hospital the same day at Marigat on 29/6/16.

I had reached the hospital at about 3pm.

I did not have any phone or watch when I went to hospital and the time I was going was an approximation.

I was injured on the back and head.

It is not true that we were treated after one week.

I recorded one statement only.

I have not flaming you I have stated what is true.

I was not issuing receipts at the market.

We did not recover anything from you that was stolen.

The donkeys were recovered and we have identified them as exhibits.

You were not photographed while with the donkeys.

S.O TEMU, PM

Prosecutor –No Reexamination.

PW4 male adult is sworn.

My name are Isaac Njoroge.

I am a resident of Laikipia Mototo sub-location

I am a business man

I sell food stuff at Mukutani and Tangulbei.

I know the accused before Court.

He is called Kaboi and he was my customer at Mukutani.

On 28/6/16 I left Laikipia with Kimita, Ngugi Kamau and Gitau for Mukutani market.

We had 10Donkeys and we had carried foodstuffs.

We reached Mukutani at 10 am and we sold our goods to 5 pm and we decided to sleep to the following day.

We woke up at 5am and we walked for about 8-10 km.

We reached Dudu Kasei and we saw three men after the Donkeys had gone ahead of us.

We had identified Kaboi and Kanyagati.

The two had guns and clubs.

We did not recognize the other man as he was behind the two.

They had asked us to put all that we had down.

We placed torches, money and phones down and we lied down and we were wiped.

I was injured on the back and head.

The accused who is before Court had ordered that we be killed but the person we did not know asked them not to kill us.

We had heard guns being put ready.

They had ordered us to carry our clothes and ran into the forest as there were other robbers on the road.

I ran into the bushes and I had heard two gun shots.

I had ran my way and after I came out I met Kimita, Kamau and Ngugi and we went and reported the incident.

I had then decided to go home and the others went to look for their donkeys.

After four days I heard that the donkeys were recovered at Kanyagati's home.

Gitau was not there when we reported.

The items were taken by the three robbers.

I had lost ksh 8000/= and one mobile phone Nokia 1600.

I had gone to hospital for treatment on the following day at Marigat Sub-county hospital.

The p3 was filled.

P3 for Isaac Njoroge is marked as MfI P7.

I was later summoned for Identification parade but I did not sign any paper/form as they were over.

The donkeys were photographed.

The donkeys are identified on the photographs.

I was able to identify the three as there was sunlight at 6 am.

The incident had taken place at about 30 minutes.

S O TEMU, PM

CROSS-EXAMINATION By Accused

Pokot and English

You were the first one to talk to us.

You had come from the side of the road and you were ahead of the others.

You had asked us to put our items down.

You were wearing a blue T-shirt and sheet under it as short.

The sheet was black and green it was like the one you are wearing in Court but the one you are wearing in Court is new.

I had hired donkeys.

In total we had 10 donkeys.

I had stated that it was Kaboi and Kanyagati that had attacked me.

After reporting I had stayed at Mukutani and the following day I went to Marigat hospital and I went home.

I had reached the hospital at about 2 pm.

I am not framing you as I have worked at Mukutani for over 12 years and all the people at Mukutani know me well and they call me their son.

I had given your names at the police station as I knew the two of you.

We were talking and the police were recording what are said.

We had identified you well.

We were not reading what the police was writing down.

S O TEMU, PM

Prosecutor – No Re-Examination

Pw5 male adult is sworn.

My name is Daudi Longor.

I am resident of Mukutani.

I am the Assistant Chief of Chemolingot Sub-Location.

I know the complainants herein.

I know Njoroge more.

He was businessman at Chemolingot.

I know the accused herein.

He resided at Koros Location and he moved to Mukutani area.

On 29/6/16 at about 8 am I received a call from the village elder Wilson Kitilit who informed me that the businessman from Laikipia had been attacked that morning as they were on their way going home.

I had gone to R.D.U at Mukutani and I reported the incident.

While on the company of police officers to Mukutani we had gone to the scene while in the company of Njoroge.

Njoroge states that they had 10 donkeys.

We did not find the donkeys but we found the charcoal that the donkeys had scatted all over the area.

There were other numbers of the public and we gathered the charcoal and honey that had been left there.

We searched for the donkeys and we followed footsteps to one area and one person had directed us to where the foot prints were.

The person was S. Mikati.

We went back to where the incident had taken place.

We again received a call when we were near Mukutani the caller informed us that he had found one of the victims and that they were following the foot prints.

I asked them to follow the foot prints.

At about 1 pm the group had stated that the foot prints had led then to the accused's home and they had found the donkeys there.

They stated that the accused had asked them what they wanted and they stated that they were following the donkeys and the accused had threatened them and they had ran to where we were and they informed us that they had met three people at that home and they gave us the names.

We waited for the evening to go to that home.

The following day one of the suspects had come to the centre and I had arrested him and I had arrested him and I had informed him that we had arrested them because people had gone to one home and they had chased them.

The man stated that he was at the said home to borrow a pump and that it was the owner of the houses that had threatened the group.

The said suspect had defended himself and the village elders had come to where we were and they requested to be allowed to go to the accused's home to avail the donkeys and all the items that they had stolen.

I had given the group one day to avail the donkeys and items.

The donkeys were brought to my office 10 in number, and the officers had confirmed.

I was informed that it was the accused and one Kanyagati who is at large that had stolen the items.

The one that I had arrested was not involved.

Later the accused was arrested.

The donkeys on the photograph is marked as MfI P3 are identified.

S O TEMU, PM

CROSS-EXAMINATION By Accused

Pokot and English

Wilson Kitilit stays two kilometer from where I stay.

The incident had taken place 6 kilometres from Kitilit's home.

Kitilit had called me about 8 am.

Kitilit had stated that he had met the complainant Njoroge.

I am not sure when the group was attacked but it was in the morning hours when they were using the spot lights.

We had commence investigations after the report.

We had followed the donkey's prints and we were informed that the prints had gone to your home.

We could not follow the foot prints as we were security officers and we had to follow another route.

We had gone back and we left the owner to follow the donkeys.

One of the donkey's owner and one boy had followed the donkeys'.

We had arrested Lokilanya first.

The said Lokilanya is not a witness in this cases as he was not one of the thieve's.

The victims had escaped to the different directions and Njoroge was the first to reach the centre.

I am not out to frame you.

I said what I have stated. I saw the donkeys.

I came to know that you were the one that had attacked the complainants.

The village elders had brought the donkeys to me and I had believed them.

One of the elders were Kilanyang who I had arrested Kilanyang was among the people who bought the donkeys to me but the elders stated that he was not one of the thieves.

You were at the home with Kilanyang and Kanyagati when the complainant saw their donkeys and Kilanyang had come to the centre when I arrested him but he was not involved in the theft.

You stay in the forest and officers cannot come to your home just like that and it is dangerous.

The elders who brought the donkeys may not be witnessed herein but the donkeys were brought to the centre and they were recovered from you and Kenyagati.

S O TEMU, PM

Prosecutor – No Re-Examination

Pw6 male adult is sworn.

I am No 231216 Chief Inspector Nyakekeri.

I am the OCS Marigat.

On the 20/9/16 I was at Marigat police station and I was requested by CPL Alexander Kanal to conduct an Identification parade of witnesses who were to identify one Magal Kaboi.

I had prepared members who were to participate in the parade.

I had paraded 8 persons.

I had informed the suspect the purpose of the parade.

I took the witnesses and I kept them in the office of the OCS and informed them that we were going to conduct the parade.

They were to pick the person that had attacked them from the group.

The members or persons who participated in the parade were of same height complainant and age.

I started with Isaac Ngugi after telling the accused to place himself in between the 8 members of the public.

The suspect was identified by Isaac Ngugi and he was in between the 3 & 5.

I was identified by being touched on the shoulder.

The 2nd witness was David Kamau.

I asked the accused to change his position before the 2nd witness went to identify him.

The accused was in between the 6 & 8 members of the parade.

David Kamau was able to identify the accused by touching his shoulder.

The 3rd witness was Morris Kimita.

I had asked the accused to change positions at the parade and he was between no 2 & 4.

The said Kimita was able to identify him by touching his shoulder.

The 4th witness was James Gitau.

I asked the accused to change position and he was placed between number 6 & 8.

The said James had identified him by touching him on his shoulder.

I had asked the accused if he had any comment after the parade and he stated that the complainant knew him before as they had met him at Mukutani area as they knew each other before.

I wish to produce the parade as an exhibit.

The accused was at the police cells before the parade and witnessed were in the Deputy OCS Office before the parade.

Those who cleared the parade were taken to the in-charge crime as they waited for the others to conduct the parade.

I wish to produce the parade form dated 20/9/16.

The form for Isaac is produced as exhibit P8.

Parade form for David Kamau dated 20/9/16 is produced ex p 4.

Parade form for Morris Kinita dated 20/9/16 is produced as exhibit p 9.

Parade form for James Gitau dated 20/9/16 is produced exhibit p 6.

S O TEMU, PM

CROSS-EXAMINATION By Accused in Pokot & English

You cannot forget the person you have seen.

I don't know whether the witnesses had seen you when you were arrested at Mukutani.

The witnesses were not all present when they identified you.

You were not given police uniform to wear.

You were changing cloths after one witness had identified you.

S O TEMU, PM

Prosecutor – No Re-Examination.

Pw7 male adult is sworn.

My name is Morris Kimita.

I am resident of Kinamba Laikipia County.

I am a farmer and businessman.

I sale cereals and vegetables at Mukutani area.

On 28/6/17 I had left Kinamba at 4 am and I reached Mukutani at 10 am and I sold my items.

It was Isaac Njoroge, Isaac Nguge, David Kamau & Gitau.

We cleared our work at 5 pm and we decided to sleep and we woke up 5 am and we started to go to Laikipia.

When we reached Dudukot at about 6 am we had met three men on the road and they asked us to remove all that we had and we removed our phone and money and we gave them they asked us to remove our clothes and gave them which we did.

I was assaulted on the legs and back.

I was able to identify two of the persons.

That is Kaboi and Kanyangati.

The accused who is before Court is Kaboi .

I had seen the two as I gave them money as they were my customers and I had known them for over three months.

The three had talked in their language and they then asked us to stand up and ran away.

We had woken up and we ran to different directions.

I had given the accused ksh 15000/= and one mobile phone Aitel in make.

We later met with the others on the following day.

I had met one person who had been sent by Mukutani Chief (Daudi) at 1 pm that day.

I had gone with the person to Kanyangati's home and Kanyangati and Kaboi has chased us while armed with guns.

We had followed the footprints to the accused's home where we met the two.

The donkeys were ours.

I had five donkeys, Ngugi had two donkeys, Kamau had two donkeys and Naiten had two donkeys which were mine and Njoroge had one donkey of his and one was mine.

The donkeys had carried items to the market.

I had waited at the road when the person I was with entered into the home and he was chased and we had met the donkeys from the river with the accused's wives.

We had ran to Mukutani police station and I had met Ngugi and Kamau there.

We had reported and we went to Marigat hospital for treatment.

We had recorded statement and we went back home and we were later asked to go and pick our donkeys by Mukutani chief and elders.

We had recovered all the donkeys.

The three persons were armed with guns which had timber.

The guns were two.

Kanyangati and Kaboi had guns.

I was able to identify the three accused persons as there was some sunshine at that time 6.30 am.

I was treated and p3 form was issued to me and it was filed.

The p3 in the name of Morris Kimita is identified in Court and treatments notes and marked as P mfl 10 a & b.

Accused is identified in Court.

I was summoned to the police station for the conduct of the Id parade.

I had given my name during the Id parade Ex P 9.

S O TEMU, PM

CROSS-EXAMINATION By Accused in Pokot and English

You had attacked us at about 6.30 am.

I had met with Kokoni an informer at 12 pm.

The other two persons that I was with had ran to the centre where they had met the Chief.

I had gone with the informer to where we had left the donkeys and we had followed the foot prints and they led us to your home and we reached there at 1 pm.

We reached the home at about 13:00 pm.

We were two when we came to your home.

We had met the donkeys at the fence of the home where we had met you.

The donkeys were at one side of the home and as we ran off we had met other two donkeys which was part of 10 donkeys.

The donkeys were with children and one lady.

We did not take the donkeys as we had been chased.

We had ran through the pushes to the centre.

All our donkeys were 10. It was not 12.

I had 5 donkeys.

I had gone for treatment at Marigat.

We had reached Marigat at about 3:30 pm.

The lorry was draining water on the road on the same date 29th.

We had all gone to hospital on the same day.

Later on another day I went to record my statements on 15/9/16.

I don't know when the others recorded statement.

The p3 was filled on 29/6/16.

We had found the 10 donkeys at your home.

You had gone with the 10 donkeys when you attacked us.

The elders are the ones who recovered the donkeys from you but don't know them.

The donkeys were photographed.

The donkeys that were photographed were our stolen and recovered donkeys.

S O TEMU, PM

Pw8 male adult is sworn.

I am No 77113 Cpl Alexander Kanan.

I am the incharge Mukutani Police station.

I am the Investigating Officer in this case.

This matter was reputed at our station on 29/6/16 as per OB 4 of the said date.

The report was over robbery with violence.

The matter was reported Kamau Njoroge & Ngugi.

They had come to the station at about 2pm and they had stated that they had been robbed by one Kanyangati and Kaboi and the other person they did not know.

I had booked the report and Investigation commenced.

The accused are known in the area and the accused is known too.

The two groups know one another.

The elders had come and they had brought the accused person to the station.

We had re-arrested him and we recorded statements.

The accused had stated that they had lost donkeys and money.

The elders stated that they had recovered the donkeys from the home of Kanyangati and Kaboi.

The two had scared the complainants when they went for the donkeys.

The donkeys were brought to the station and they were photographed.

The complainants stated that they were assaulted during the robbery and I had issued them with p3 forms which were prepared by

the Clinical Officer.

I had arranged for the Id parade.

Because I was the Investigating Officer I had requested the OCS Marigat to conduct the Id parade.

The witnesses were summoned to the police station and the accused was also taken there and he was positively identified by the complainants.

The complainant stated that the accused were armed with AK 4 Rifles.

The photograph are produced as exhibit p3 a & b.

Certificate is produced as exhibit p11.

S O TEMU, PM

CROSS-EXAMINATION By Accused Pokot & English

I had received the complaint's report at about 2 pm.

The person were three in number.

The complainants had given the names of Kanyangati and Kaboi when they reported at the station.

The OB extract is read in Court.

Report is made at 2 pm.

Report is over Robbery with violence.

The report does not have any persons name.

We were given 10 donkeys.

The donkeys were brought to the station and since we have no person to take care of them they were released to the police.

David Lekor the area assistant chief is the one who brought the donkeys to the station.

The persons who brought the donkeys stated that the donkeys were at the home where you were staying with Kanyangati.

You were not found with any items when the elders brought you to the police station.

The witnesses had identified you when you were arrested.

The complainant knew you well with Kanyangati but they did not know the other person.

The witnesses had mentioned you after the first report and that was why we had conducted the Id parade wherein you were identified.

The names of the robbers were given by the complainants after the OB had been recorded.

I had issued the p3 forms on 29/6/16 and I don't know which dates they went to the hospital as the area is far and they were scared of attack as they had mentioned you.

One can be treated and p3 filled later.

The witnesses might have gone to fill p3 after treatment on different days.

I was at the police station when you were arrested.

The complainants were at Kinaba at Laikipia when you were arrested.

You did not even slept at the station after arrest.

I had left Marigat police station when I took complainants there and the OCS was the one who conducted the Identification parade.

I did not point you out to the witnesses during the parade date.

We did not capture the elders when the donkeys were photographed.

S O TEMU, PM

Pw 9 male adult is sworn.

My name is Michael Kiprono Mengich.

I am Clinical Officer and in the year 2016 I was at Marigat but now I am at Mogotio.

I have p3 form for Isaac Ngugi which I filled on 24/6/16.

The p3 was sent to me by OCS Marigat.

The patient was treated under O.P No. 15197/16.

The patient was Isaac Ngugi aged 30 years.

He stated that he had been attacked by thugs when going home.

He had changed his clothes.

He gave history of having been assaulted by known persons.

He was injured on the head.

He was in fair general conditions and he was not smelling any alcohol.

He was swollen on the back side of the head.

He had no other injuries.

The injuries were one week old and weapon used was blunt.

He was given pain killers.

The degree of injury was assessed as harm.

I was to produce the p3 as exhibit p1.

The p3 for Ngugi is produced as exhibit p1.

On the 6/9/16 date I also examined one David Kamau aged 30 years.

He was sent from Marigat police station. He was given No 15195/16.

He stated that he had been assaulted when going home at Mukutani area.

He had changed cloths.

He had been assaulted by known person using sticks.

He was in fair general conditions and he was not smelling alcohol.

Upon Examination he had tender shoulder joint of the left hand.

That was the only injury that he had.

The injury was about one month to the date of filling the p3.

He was given pain killer.

The injury was caused by blunt object.

I wish to produce p3 as exhibit p2a.

I categorized the injury as harm.

In treatment notes dated 29/6/16 are produced as exhibit p2b.

S O TEMU, PM

I also examined one Jane Gitau aged 38 years.

He was referred to me from Marigat police station on 29/6/16 at the hospital.

He had changed cloths when p3 was filled.

He had been assaulted by known persons who had robbed him and had hit him on the back.

Upon Examination he was in fair general conditions.

Upon Examination he had injuries to the back region and thorax which were tender and painful.

All other parts were normal.

I had filled the p3 and assessed the degree of injury as harm.

The injuries were caused by blunt object.

The p3 is produced as exhibit p4 .

S O TEMU, PM

I had also examined one patient by the name of Isaac Njoroge aged 45 years.

He was referred to the hospital by OCS Marigat.

He was given No. 15197/16.

He stated that he had been assaulted by known person.

He stated that he had been injured on the head.

He was in fair general condition.

He was swollen at the back of the head and all other parts of the body were normal.

The weapon used was blunt.

The injury was categorized as harm.

He was given pain killers.

I wish to produce the p3 as an exhibit.

The p3 is produced as exhibit p4.

S O TEMU, PM

I had also treated and filled p3 for one Kimita Maurice.

He was referred to the hospital by OCS Marigat.

He had been attacked by persons who were armed with AK 47 Rifles.

Upon examination he was given No. 15196/16.

He had changed cloths.

He stated that he had been assaulted by known persons.

He was injured on the left shoulder.

He had no other injuries and he was in fair general conditions.

I had categorized the injuries as harm and it was caused by blunt object.

The injuries were about one month when I filled the p3.

He was given pain killers.

I wish to produce the p3 as an exhibit.

The p3 dated 16/9/16 is produced as exhibit p 5a.

I have his treatment notes.

The treatment notes dated 29/6/16 are produced as exhibit 10a.

CROSS EXAMINATION By Accused

I had examined the patient on 29/6/17.

I had seen four persons.

They were coming at different times.

I cannot tell when the last patient came but it is indicated on the p3 forms.

The patients stated that they could identify the persons by appearance.

They did not give their assailants names.

The patients had come days after the attack.

The patients were treated on a different date and p3 forms were filled on another date.

A patient seeks for treatment depending on the place he was injured.”

9. When put on his defence, the appellant gave an unsworn statement denying any involvement in the alleged offence follows:

“Accused’s unsworn statement in Pokot and English:

My name is Kaboi Makal.

I am resident of Sereni.

I am herdsman.

The charges are not true.

On the month of June 2016, I was taking care of my animals and on the date of arrest I had taken care of my cows and I was just at home.

On 13/9/16 my wife was sick and I had taken her to hospital at Mukutani.

On the way I was arrested but I did not know as to why.

I asked them why they had arrested me but we did not understand each other as we could not communicate due to language.

I was taken to Mukutani police station and people came to see me but they did not talk to me.

I was taken to Marigat police station where I stayed for six days.

While at Marigat the people who had seen me at Mukutani had come and conducted a parade on me and the police did not tell me as to what was happening on the date of parade 20/9/16 the police officers had put on police uniforms.

I was then brought to Court and the charges were read to me.

I don't know anything to do with this case.

That is all."

Judgment of the trial Court

10. The trial Court in convicting the appellant held that the prosecution had proved its case against the appellant to the required standard of proof, beyond reasonable doubt, as follows:

"The witnesses/complainants herein stated that when they were attacked it was almost morning hours and there was some sunlight and thus they were able to see and identify the accused as they knew him before.

The accused in his defence only stated that he was arrested as he went to take his wife to the hospital. He did not dispute or contradict the evidence that the accused knew him before the date of arrest and that the stolen donkeys were recovered from his home. It was thus clear that the prosecution's evidence of identification at the time of arrest and after the incident was corroborative and beyond doubt that the accused was at the scene and he was among the persons that robbed the complainants.

The complainants were five in number and they all identified the accused as one of the assailants and I have no reasons to doubt them all.

The Clinical Officer stated that indeed the accused were injured in the process of the robbery which then confirmed that indeed the assailants had used force against the five complainants as they robbed them.

All the complainants stated that the accused were armed with Rifles when they attacked them and thus the charges were proved that indeed the accused were armed with dangerous weapons when they robbed the complainant and when they went to make recoveries the accused had still used the same weapons to scare them off.

I thus find that the accused was among the persons that had robbed the complainants and indeed they had used violence against them why they informed them that they were armed with dangerous weapons.

I thus find the accused guilty and I convict them for the offence of Robbery with violence as charged under section 296 (2) of the Penal Code on all the five counts.

S O TEMU, PM

22/11/17"

11. The DPP opposes the appeal.

Issue for Determination

12. The twin issue in this trial is whether the offence of robbery with violence contrary to section 296(2) of the Penal Code has been proved and whether the appellant has been properly identified as one of the assailants.

13. It would appear from the tone of the trial Court in the judgment that it shifted the burden of proof to the appellant in saying that –

"The accused in his defence only stated that he was arrested as he went to take his wife to the hospital. He did not dispute or contradict the evidence that the accused knew him before the date of arrest and that the stolen donkeys were recovered from his home."

14. However, the correct legal position is that the burden of proof of a criminal charge remains with the prosecution at all times and never shifts. The Court will therefore consider whether on the evidence available the prosecution had established the guilt of the appellant and not whether the appellant was able to rebut the evidence of the prosecution. The appellant is entitled under Article 50 (2) (i) of the Constitution **'to remain silent, and not to testify during the proceedings'** and, if he chooses to testify, his evidence of the defence is only crucial in considering whether a reasonable doubt as to his guilt, which must be set up by the prosecution evidence, exists to attract the right to the

benefit of the doubt under the proviso to section 111(1) of the Evidence Act. The burden of proof in criminal cases, otherwise, remains with the prosecution.

Determination

Defective charge sheet

15. At the outset, there is no requirement contrary to the appellant's submission, that the witnesses recorded their statements on the same day of report to police station or that each of them records his/her statement on the same day as other witnesses, and there was consequently no merit in the submission that the charge sheet ought to have been amended to indicate date of statements. The requirement is that the defence be accorded adequate opportunity to prepare for his defence by prior supply of statements and other evidence to be used at his trial. Article 50 (2) (j) of the Constitution.

Failure to call crucial witnesses

16. As to failure to call crucial witnesses, there is no requirement to call all the possible witnesses in the trial. See section 143 of the Evidence Act that **"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."** Failure to call a crucial witness is only material and fatal where other evidence presented is not adequate proof of the offence. In *Bukenya & Ors. v. Uganda* (1972) EA 549 it was held that, significantly, that:

*"(iv.) Where the evidence called is **barely adequate**, the Court may infer that the evidence of the uncalled witnesses would have tended to be adverse to the prosecution."*

[Emphasis Mine]

The question is, therefore, whether there was before the Court sufficient evidence to prove the charge.

Proof of robbery with violence

17. Proof of the offence of robbery with violence requires evidence of the ingredients as settled by the Court of Appeal in *Johanne Ndungu v. R*, Mombasa Criminal Appeal No. 116 of 1995 as cited in *Patrick & Anor. v. R* (2005) 2 KLR 162, 167 held as follows:

"What acts constitute an offence under section 296 (2) of the Penal Code? This Court considered that question in Johana Ndungu v Republic – Criminal Appeal No 116 of 1995 (unreported) where it stated:

*"In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with section 295 of the Penal Code. **The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in section 296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:***

*(1) **If the offender is armed with any dangerous or offensive weapon or instrument, or***

*(2) **If he is in company with one or more other person or persons, or***

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

*Analyzing the first set of circumstances the essential ingredient apart from the ingredients including the use or threat to use actual violence constituting the offence of robbery, **is the fact of the offender at the time of robbery being armed with a dangerous or offensive weapon. No other fact is needed to be proved.** Thus if the facts show that at the time of commission of the offence of robbery as defined in section 295 of the Penal Code, the offender was armed in the manner afore-described then he is guilty of the offence under sub-section (2) and it is mandatory for the Court to so convict him.*

*In the same manner in the second set of circumstances **if it is shown and accepted by Court that at the time of robbery the offender is in company with one or more person or persons then the offence under sub-section (2) is proved** and a conviction thereunder must follow. **The Court is not required to look for the presence of either of the other two set of circumstances.***

*With regard to the third set of circumstances there is no mention of the offender being armed or being in company with others. The Court is not required to look for the presence of either of these two ingredients. **If the Court finds that or immediately before or immediately after the time of robbery the offender wounds, beats, strikes or uses any other violence to any person (may be a watchman and not necessarily the complainant or victim of theft) then it must find the offence under sub-section (2) proved and convict accordingly.**"*

18. See also *Juma v. R*. (2003) 2 EA 471, and *Odhiambo & Anor. v. R* [2005] 2 KLR 176 on ingredient of and the test of dangerous or offensive weapon is being the use to which the person possessing it intends to put it. In this case, complainants testified that one of the

assailants had put his gun on the ready to shoot them when one of his colleagues prevailed on him not to shoot them, and they were consequently ordered to take their clothes and run.

Medical evidence

19. The medical examination report (P3) forms were all completed at Marigat District Hospital signed and stamped by M. K. Mengich for District Medical Officer of Health and dated 20/9/2016 for Isaac Njoroge and James Gitau; date stamped 16th September 2016 and 20th September 2016 respectively for David Kamau and Kimita Maurice but undated for the other complainant, Isaac Ngugi. There is contrary to the contention by the appellant nothing untoward for a P3 to be filled on a date long after the alleged assault because a P3 form is a record of examination injuries sustained and it may be filled after treatment based on treatment notes taken at the time of treatment. However, the printed Marigat sub-county Hospital treatment General Out-patient Record Card for Maurice Kimita the card Serial No. 3735 ex. 10b is dated 29/06/16, while that of the complainant David Kamau from the same hospital (Ex. 2a) with a later serial Number 3737 is dated 29/06/16 with a cancellation on the date indicating that it had been dated 26/06/16.

20. However, even if the Court discounts the medical evidence of the alleged beating of the complainant on account of the unexplained delay between the treatment for the assault and the filling of the Medical Examination Report forms (P3), the other ingredients of the offence of robbery with violence namely, offender being in the company of other person and being armed with a dangerous weapon are satisfied by the evidence before the Court, and as held in *Johana Ndungu v. R.*, supra, the existence of any **one** of the ingredient for robbery with violence suffices.

21. In this case, there was incontestable proof by the accounts of all the five complainants that there were **three** attackers, two of whom were **armed dangerous weapons** namely guns, and the attackers **beat** and **wounded** the complainants with a stick on their heads and backs, and with **theft** of their donkeys, money and torches, the offence of robbery with violence was complete. Each of the facts of the offender (1) being in the company of others, (2) being armed with a dangerous weapon and (3) beating the complainants, separately qualify the theft of the complainant property as a robbery with violence within the meaning of section 296 (2) of the Penal Code.

22. Inconsistency as to the role of the accused in beating and his co-assailant Kenyangati searching and the unknown 3rd suspect standing watch according to PW2 or searching their clothes according to PW1 is not sufficiently material when considered against the consistent testimony of the witnesses as to attack by three assailants. On the principle of common intention under section 21 of the Penal Code, all the attackers regardless of the role they play in the offence of which it is their common intention to commit, which intention in this case is manifested by their various participation in the robbery, as follows:

“21. Joint offenders in prosecution of common purpose

*When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and **in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.**”*

Identification of the appellant

23. The Court takes counsel that in cases of identification, care must be taken to avoid a conviction on mistaken identity of the accused, following *Roria v. R* (1961) EA 583 establishing *“the need to test with greatest care the evidence of a single witness in respect of identification especially when it is known that conditions favouring a correct identification were difficult [and] in such cases there is need for other evidence.”*

24. The complainants testified that they knew the appellant and one of his co-assailants Kenyangati as their customers for period a period of one year, save for the PW7 who said knew them for a period of three months. This is a case of recognition whose evidence according to the authority of *Anjononi v. R* (1980) KLR 59 is stronger than that of physical identification. As admitted by prosecution witness investigation officer (PW8), however, the complainants' Occurrence Book report did not indicate, contrary to their assertions that they had told the police the names of their assailants, that the complainants knew the assailants by the names. The Court agrees with the appellant that, an identification parade would not have been necessary, in a case of recognition identification. It does not, however, mean that the charges were a fabrication if the police, in abundance of caution, conduct an identification parade in a case of identification by recognition.

Identification parade

25. The appellant's complaint as recorded in the Identification Parade forms was that the identifying persons had already seen him at Mukutani. The appellant reiterated this objection in his unsworn defence statement before the trial Court. There appears to be no merit in this objection as there was no evidence by any of the prosecution witnesses, save the unsworn assertion of the defence, that the complainants had any time after the attack seen the appellant in police custody at Mukutani or anywhere else. They only claim to have seen him at home when they had, with an informer followed the donkeys' foot prints when his alleged co-attacker Kenyangati had chased them away by shooting in the air. The appellant's unsworn statement, which was not tested by cross-examination is, of course, of little probative value in this regard as held by the Court of Appeal in *May v. R*, (1981) KLR 129 although it *“should be taken into consideration in relation to the whole evidence.”*

26. It was not necessary to call for an identification parade in a case of recognition. The complainants had told the police when they reported that incident that they knew the attackers as Kaboi and Kenyangati and one other unknown Pokot man. The Court of Appeal has held that the Occurrence Book (OB) extracts are not evidence. See *Japheth Gituma Joseph & 2 others v Republic* [2016] eKLR, as follows:

“Reports of commission of alleged crimes are normally made to a duty officer at a police station and may be made by a person who

is not the complainant as in cases where the complainant is admitted in hospital. **The report is merely a report of occurrence – a bare report of a crime and not evidence of commission of an offence against any person.**

27. However, as a first report, it is admissible for purposes of proving consistency of the witnesses in terms of section 165 of the Evidence Act, or impeaching the credit of a witness under section 163 (1) (c) as follows:

“163. Evidence to impeach the credit of a witness

(1) The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him—

(c) **by proof of former statements, whether written or oral, inconsistent with any part of his evidence which is liable to be contradicted...**

165. Proof of consistency by former statements

In order to show that the testimony of a witness is consistent any former statement made by such witness, **whether written or oral, relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.**

28. However, in this case, the witnesses were consistent that they reported the attack and gave the names of the attackers. The Investigation Officer who received the report of the attack said-

“The complainants had given the names of Kanyangati and Kaboi when they reported at the station.”

The witness however confirmed in cross-examination that the OB extract did not have names. Moreover, as provided in Evidence Act, the former statements under sections 163 and 165 need not be written or recorded as in the Occurrence Book; they may as well be **oral**, as with the testimony of the Investigation Officer herein.

29. With the caution that the identification of the assailants by the morning light at 6.00am the alleged time of the attack, the Court has warned itself of the danger of conviction on such identification and sought corroboration, which it has found in the evidence that the appellant, his said co-assailant Kanyangati and a third unknown person were at the place where the stolen donkeys were found after following their foot prints. Although not taken up, the doctrine of recent possession of stolen property would apply to support an inference that the appellant and his colleagues were the thieves of the donkeys stolen the very morning of discovery upon following of the donkeys' foot prints.

30. On the evidence, this Court has no doubt that the appellant was one of the assailants who attacked the complainants on the morning of 29/6/2016 and stole from them money, torches and donkeys and in the course of the robbery threatened to shoot the complainants and using sticks beat and wounded the complainants as set out in the respective counts of the charge sheet.

Conviction

31. I would, therefore, find that the offence of robbery with violence contrary to section 296 (2) Penal Code was proved beyond reasonable doubt in view of the presence of the ingredients that the theft of the complainants' donkeys, money and torches was conducted by more than one person, who were armed with dangerous weapons namely guns and in the process of theft, the assailants wounded the complainants by whipping them variously on their heads and backs, albeit not to any aggravated degree.

Sentencing

32. In mitigation before the trial Court, the appellant said:

“Mitigation

Accused – I urge the Court to forgive me.

I have suffered for a long in custody.

I urge the Court to forgive me.”

33. I would, respectfully, agree with the trial Court that the minor nature of injuries on the complainants and the fact of recovery of all the stolen donkeys are mitigating factors to be considered. This Court also considers that the value of the items which were not recovered - money and torches – is modest; all in all not calling for a severe sentence. However, the use of fire-arms, even if only to scare the persons sought to be robbed, must be discouraged by effective custodial sentence, and a sentence of ten (10) years, with the possibility of remission of a third thereof for good conduct, cannot be taken to be excessive. This Court does not find, on the principle of **Wanjema v. R** (1971) EA 493 for interference with the sentencing discretion of a trial Court, any ground to justify interference with the sentence.

34. There is, however, no indication in the ruling on sentence that the trial Court considered, as required by section 333 (2) proviso of the Criminal Procedure Code, the period of pre-trial detention, an issue raised by the appellant in his mitigation before the trial Court. The Court only said:

“SENTENCE

I have considered the nature of the offence and circumstances.

*I have also considered the fact that **the accused and his accomplices did not cause serious injuries on the complainants** and they had spared their lives though armed with guns and they had all the chances to kill them as the offence had taken place in the forest and they had stolen them but the donkeys were later recovered.*

*In view of the recent Supreme Court of Robbery under section 296 (2) of the CPC, **I find that the accused does not deserve the maximum sentence and I thus sentence him to serve 10 years imprisonment.** Sentence to run concurrently for the five counts.*

S O TEMU, PM

9/1/18”

35. Rightly, the trial Court ordered that the sentence on the five counts be served concurrently, considering that the five offences were committed as part of the same transaction. See **Ondieki v. R** (1981) KLR 430.

36. However, section 333 (2) Proviso of the Criminal Procedure Code requires the sentencing Court, while considering a sentence of imprisonment, to take into account the period that the accused has been in custody awaiting the conclusion of his case as follows:

“(2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

[[Act No. 7 of 2007](#), Sch.]”

37. As the record does not show that the trial Court adverted its mind to the period of pre-trial detention, there is no basis for this Court to find that the Court had taken into account in arriving at the sentence of imprisonment of 10 year. It may be that the Court passed the sentence of 10 years having taken into account such period of remand but then again may be not.

38. This Court must give the benefit of the doubt to the appellant and assume, as the contrary is not shown to have been the case, that the Court did not take into consideration the period of custody since arrest on 14th September 2016 to 9th January 2018 when the sentence was passed, **a period of over two (2) years three (3) months.**

Orders

39. Accordingly, for the reasons set out above, the Court, while finding no merit in the appeal from conviction mounted by the Amended Petition of Appeal, which is consequently dismissed, alters the date of commencement of the sentence of imprisonment for ten (10) years to begin on the **14th September 2016** when the appellant was arrested and placed in custody awaiting his trial herein, pursuant to sections 333 (2) and 354 (3) (b) of the Criminal Procedure Code.

Order accordingly.

DATED AND DELIVERED THIS 15TH DAY OF JANUARY 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.